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Enhancing the Antitrust Damages Action in China
Some Lessons from the EU

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Abstract

Article 50 of the Anti-Monopoly Law of China (AML) 2007 and its complementing rules, the Judicial Interpretation 2012 of the Supreme People's Court (SPC), have provided a legal framework for the antitrust damages action in China. However, the general and ambiguous language of Article 50 and the Judicial Interpretation 2012 fails to provide clear guidance for the courts and parties to antitrust damages actions, in terms of key issues, such as quantification of antitrust damages and the availability of collective action. Moreover, the current framework provided by the AML 2007 has not touched on some controversial issues, such as whether damages litigation is possible against antitrust violations conducted by an administrative agency. These weakness and gaps have impeded the development of the antitrust damages mechanism in China.

Meanwhile, the EU has adopted Directive 2014/104 to facilitate private enforcement of competition law in the Member States. Due to the similarity in the combined public/private enforcement model of competition law between the EU and China, the thesis adopts the private enforcement mechanism of EU competition law, as a comparative reference. In doing so, the thesis seeks to fill in some gaps in the existing antitrust damages mechanism provided by the AML 2007, by focusing not only on civil procedural issues in the antitrust damages action against private anticompetitive behaviour, but also examining the administrative litigation procedures and substantive issues involved in the antitrust damages action against administrative monopoly.

Regarding the debate on compensation vs. deterrence as goals of antitrust damages actions in China, the thesis contributes to this debate, by submitting that full compensation should be the goal actively pursued by antitrust damages actions, while deterrence, as a side effect of antitrust damages actions, complements optimal deterrence pursued by public enforcement of the AML. Then the thesis examines the quantification of antitrust damages which is directly linked to the achievement of full compensation.

The thesis also seeks to propose a workable collective action mechanism for antitrust damages actions in China, which is indispensable to achieving full compensation in an antitrust mass harm situation. By referring to the recent reform of collective actions adopted in the UK, where opt-out collective proceedings have been introduced into the antitrust collective action, the thesis finds that opt-out proceedings would be a good incentive to support the initiation of antitrust damages litigation in China, while proper limitations are needed to be imposed on its application in order to avoid US-style unmeritorious litigation.

In addition to private anticompetitive behaviour, the thesis also explores the antitrust damages mechanism against public anticompetitive behaviour, from both substantive and procedural perspectives. It finds that a proportionality test would be an approach to consider when assessing whether an anticompetitive administrative measure is justified on the grounds of public interest, or alternatively whether such regulation or behaviour amounts to abusive and ultimately illegal conduct. In the procedural aspect, the thesis proposes a two-step procedure, including first, judicial review of the alleged measure, and second, the follow-on damages assessment; and the requirement for a compulsory linkage to be established between them.

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Glossary of Abbreviations:

AMEA	Anti-Monopoly Enforcement Authority under the State Council
AML	Anti-Monopoly Law of China
AQSIQ	General Administration of Quality Supervision, Inspection and Quarantine
AUCL	Anti-Unfair Competition Law of China
CAT	Competition Appeal Tribunal
CJC	the Civil Justice Council
CJEU	Court of Justice of the European Union
CPL	Civil Procedure Law of China
CPO	Collective Proceeding Order
CRA	Consumer Rights Act
MOFCOM	Ministry of Commerce
NDRC	National Development and Reform Commission
OFT	Office of Fair Trading
SAIC	State Administration of Industry and Commerce
SGEI	Service of General Economic Interest
SMEs	Small-and-Medium Enterprises
SOEs	State-Owned Enterprises
SPC	Supreme People's Court of China
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

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Chapter 1 Introduction

1. Statement of the Problem

The thesis aims to explore effective solutions to enable the enhancement of the damages action under the Anti-Monopoly Law of China (the AML) 2007, in order to achieve full compensation for victims arising from harm caused by anticompetitive behaviour, with comparative reference to the EU's jurisprudence on the EU antitrust damages action.

Article 50 of the AML generally provides a legal basis to allow the victims of AML infringements to bring damages litigation before the courts. A Judicial Interpretation regarding the antitrust damages action[1], which was issued in 2012 as an implementing complement to Article 50, clarifies some basic procedural elements of the antitrust damages action against private anticompetitive behaviour, such as stand-alone/follow-on actions, designation of competent court, and limitation periods. However, despite these developments, the reality is that what has been provided, remains far from a sound damages mechanism, because questions arise as to whether it includes sufficient measures not only to provide sufficient incentives for the victims to initiate antitrust damages actions in the first place, but also whether it provides for a pathway to predictable proceedings to ensure that the parties can forge reasonable litigation strategies, on top of the question of whether the courts will make proper and convincing decisions, in order to achieve full compensation for the harm caused by either private or public anticompetitive behaviour.

This weakness is reflected specifically in the lack of clear guidance on quantification of antitrust damages, and the absence of an effective collective action mechanism for small and scattered antitrust damage caused by private anticompetitive behaviour. These two issues are the most directly linked to the achievement of full compensation question, which requires not

[1] The Judicial Interpretation on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct was issued by the Supreme People's Court of China in 2012.

only compensation for all harm caused by anticompetitive behaviour, but also that compensation is awarded to all victims of such illegal behaviour.

To aggravate the situation, the AML and its Judicial Interpretation 2012 remain silent as to the availability of damages arising from "public" anticompetitive behaviour, i.e., anti-competitive behaviour of administrative monopoly[2], notwithstanding that the AML dedicates its Chapter 5 to a variety of anticompetitive infringements conducted by administrative agencies. It is observed that administrative monopoly, which is a ubiquitous phenomenon in China (where economic transition has been taking place from a "planned economy" to "market economy" model of Chinese style), has caused even more serious and widespread harm to the Chinese economy than private anticompetitive behaviour.[3]

Further obstacles to full compensation arise when one observes the implementation of the AML's provisions with respect to administrative monopoly: the AML only provides administrative "inside-correction" mechanisms[4], which have proved ineffective in deterring administrative monopolies because of their bureaucratic nature.[5] Recent cases brought by undertakings against government agencies due to their administrative anticompetitive behaviour, for example, the *Guangdong Education Department* case[6], have reflected a critical weakness of the antitrust damages action instituted against administrative monopoly, that is, the court failed to consider the antitrust damages award for the losses caused to the victims, even though the court declared that the relevant administrative measures constituted abuse of administrative monopoly.

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[2] Administrative monopoly refers to administrative measures conducted by a state agency or its private affiliate, with the effect of restricting market competition.

[3] Private anticompetitive behaviour refers to the behaviour conducted by private undertakings, with the effect of restricting market competition.

[4] Article 51 of the AML provides that the superior authority of the offending agency has authority to sanction such administrative monopoly conduct by ordering the offending agency to stop the conduct.

[5] The bureaucratic incentive of the administrative enforcement agency has been deeply rooted in the unique political system of China, particularly the political process of decision making.

[6] *Shenzhen Siweier Technology Ltd. v. Department of Education of Guangdong*, (2014)穗中法行初字第 149 号, (2015)粤高法行终字第 228 号. In this case, Siweier Technology Ltd. brought a lawsuit against Guangdong Education Department, alleging that Guangdong Education Department's illegal designation of a specific software of Guanglianda, the competitor of Siweier, in a national contest, has blocked Siweier's access to the relevant market, and thus, eliminated the competition. The Court ruled that the behaviour of the Department of Education of Guangdong province breached Article 32 of the AML, constituting the abuse of administrative monopoly. But the Court overturned the damages claim of the plaintiff on the ground that there was no *direct* loss caused to the plaintiff.

Therefore, the thesis seeks to offering possible measures to enhance the antitrust damages litigation against the private and public anticompetitive behaviour in China, by providing guidance for quantification of antitrust damages, establishing a collective action mechanism for antitrust mass harm claims filed against private anticompetitive behaviour, and exploring a judicial approach to ensuring the right to damages for antitrust harm caused by administrative monopoly, in order to achieve full compensation for antitrust victims.

2. Historical Development of Competition Law and its Private Enforcement in China

The competition law of China, the AML, was adopted in August 2007.[7] The thesis focuses on the private enforcement of the AML 2007 and refers to relevant laws and regulations wherever necessary. Therefore, an introduction of the historical background of the AML 2007 will be helpful to better understand the gist of the thesis.

2.1 Prior to the AML 2007: fragmentation of competition regulation

Since 1949, influenced by Soviet-style command economy, China had pursued a centrally planned economy, where the concept of market competition was completely abandoned and condemned because market competition was regarded as a characteristic of the western capitalised market economy model, to which the Chinese government had a strong aversion.

With the initiation of the *Reform and Opening-up Policy*[8] in 1978, in order to perform an economic transition from a centrally planned economy to a socialist market economy[9], a limited degree of competition was introduced for the first time by the central government into

[7] The Anti-Monopoly Law was promulgated by the Standing Committee of the National People's Congress on 30 August 2007 and came into force in 1 August 2008.

[8] The Reform and Opening-up Policy was initiated in 1978 by Deng Xiaoping, then-President of China. The Reform and Opening-up Policy has been regarded as the starting point of economic transformation from centrally planned economy to socialist market economy in China. In addition to economic aspect, this Policy also has significant influence on the justice and political system of China.

[9] For the concept of socialist market economy, see Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolters Kluwer Law & Business 2014) 19.

the market as part of socialist economic development strategy.

This first attempt had produced a national-level law to specifically permit market competition, namely, the 1980 Provisional Regulation on the Development and Protection of Socialist Competition.[10] It focused on the protection of competition, and regulation of government monopolies, so as to remove barriers to free trade of goods between different regions in China.[11]

Following this first administrative regulation[12] on competition issues, a series of administrative regulations were issued[13], endeavouring to provide a comprehensive regulation of more specific competition issues. These administrative documents signified the initial formation of the competition policy in China.

During this initial stage, the enforcement of these competition policies was confined to fragmented public enforcement[14] by the respective enacting administrative agencies, which were the State Council and its agencies.[15] No access to justice was provided for private individuals, because the rationale underlying the initial competition policies was that the limited permitted competition should remain under the control of the central government, and that it should work in compliance with the central planning economy world.[16] For example, while it was recognised that competition should be introduced into pricing mechanisms, the

[10] The Provisional Regulation on the Development and Protection of Socialist Competition was adopted by the State Council on 17 October 1980 and repealed on 6 October 2001. The official release is available at http://www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf, accessed in September 2017.
[11] Ibid. The Provisional Regulation was aimed to remove the barriers, like exclusive operation, unreasonable prices, regional blockage and departmental division.
[12] The administrative regulation is issued by the State Council under the Constitution and Law. It has the same binding effect as law though it is inferior to law in the legal hierarchy.
[13] For example, the 1986 State Council Notice on Seriously Dealing with the Problem of Product Tying; the 1987 State Council Regulation of Advertisement Administration; the 1987 State Council Regulation of Price Administration, the 1989 Provisional Rules on Business Mergers, and the 1990 State Council Notice on Breaking Regional Blockages and Further Improving the Free Flow of Goods (repealed in 2016).
[14] At this stage, the competition policies were implemented by government agencies, without involvement of the national courts.
[15] These administrative agencies are affiliated to State Council, they were obliged to stipulate implementing rules according to the State Council's competition policies. For example, following the 1986 State Council Notice on Seriously Dealing with the Problem of Product Tying, the State Planning Commission, the State Economic and Trade Commission, Department of Commerce, the State Price Bureau, and the State Administration for Industry and Commerce jointly issued further provisions to implement the State Council's Notice.
[16] Qian Hao, 'An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution', in Caroline Cauffman & Qian Hao(eds), *Procedural Rights in Competition Law in the EU and China*, (China-EU Law Series 3, Springer 2016).

state-owned enterprises still had to apply for government approval to raise prices.[17]

Therefore, the private enforcement of competition regulations was not a feature of the legal landscape during the period between the early 1980s and early 1990s, when government-controlled competition was initially introduced, because it was primarily seen as a tool to develop some elements of market competition, into an actual centrally controlled planning-dominant economy.

A new era of competition legislation started in 1993, when the Anti-Unfair Competition Law[18] (AUCL, 1993) was adopted by the Standing Committee of the National People's Congress. This was the first serious top-level attempt[19] to regulate certain anticompetitive behaviour, for example, predatory pricing; tying; designated transactions by public utilities[20]; and administrative monopoly.[21]

Regarding its enforcement, the AUCL 1993 provided specific administrative liabilities[22] for different anticompetitive behaviour.[23] Moreover, it, for the first time, allowed business operators to institute litigation against unfair trading behaviour and recognised the right of victims to seek compensation, calculated based on their actual losses, investigation costs, or alternatively the illegal profits of the defendant.[24] However as to the provision of procedural rules to effectively exercise these rights, it failed to provide adequate procedures to enable the

[17] The 1987 State Council Regulation of Price Administration.
[18] The Anti-Unfair Competition Law was firstly adopted in February 1993, and came into force in December 1993. The draft of its second amendment has been published for public consultation in February 2017. In November 2017 it is officially adopted by the Standing Committee of National People's Congress, and come into force in January 2018.The AUCL 2017 drops the regulations on some typical anticompetitive behaviour, such as bid rigging, tying and administrative monopoly.
[19] The National People's Congress is the highest legislature in China's legislative hierarchy, so the legislation adopted by the NPC is the highest in legal hierarchy in China.
[20] Article 6 and Article 23 of the AUCL 1993 regulate such designating behaviour of the public undertakings or the undertakings with exclusive right. For example, such undertakings tend to force their purchasers to buy designated product, to the effect of squeezing out competitors from the market.
[21] Art.6 of AUCL 1993. prohibits designated transactions by public utilities; Art. 7 prohibits administrative monopolies, namely, the government and its departments abuse administrative power to restrict market competition, for example, designating behaviour, and limiting free trade of goods among different districts; Art.11 bans predatory pricing; Art.12 forbids tying; Art.15 prohibits bid rigging.
[22] The administrative liabilities are imposed by the administrative implementing agencies upon the infringer, for example, fines, confiscation of illegal gains.
[23] Art.23, 27 and 30 of the AUCL 1993 set out the administrative liabilities respectively for designated transaction by public utilities, bid rigging, and administrative monopolies. For example, as to designated transaction by public undertakings, the relevant implementing agency shall order to stop illegal behaviour, and may impose the fine ranging from 50,000 to 200,000RMB Yuan according to severity of the infringement, and confiscate the illegal gains.
[24] Art. 20 of the AUCL 1993.

successful mounting of antitrust litigation.

Despite this procedural gap, a few damages actions did come before the courts from victims of anticompetitive behaviour prohibited by the AUCL 1993. However, it was not the AUCL 1993 that provided the legal basis for these legal actions, instead, other laws, such as the Economic Contract Law[25] and the Civil Procedural Law[26], were relied upon in order to sue the alleged defendants. Among these cases, the most remarkable ones were *Dongjin v. Intel*[27] and *Dexian v. Sony*.[28] However, it is notable that the fundamental principles relied upon by the court when hearing these cases, were contract law and tort law.[29]

More importantly, during this period, most of the cases arguing breach of the AUCL 1993 ended up either losing or settling the cases.[30] It is argued that the failure of victims in these cases was partly due to the lack of a litigation mechanism, specifically designed for anticompetitive actions.

During the same period, between the early 1990s and 2007, there were several other laws adopted which deal with different aspects of competition. For example, the 1993 Consumer Protection Law[31] regulated consumer-related business conducts which violated fair trade in the market; the 1997 Pricing Law[32] prohibited unfair pricing activities, such as predatory pricing, collusion to manipulate prices, and discriminatory pricing; and the 1999 Tender and

[25] The Economic Contract Law was firstly adopted in 1981, and its third amendment was adopted in 1993, and was repealed in 1999, when the new Contract Law was promulgated and came into force in 1999.
[26] The Civil Procedure Law was adopted and effective in 1991, then experienced two amendments in 2007 and 2012.
[27] *Beijing Dongjin Tech. Co. v. Intel*, (2005) Gaominzhongzi No.1379, (2005 高民终字第 1379 号). In 2005, following a litigation brought by Intel, who alleged that Dongjin has violated Intel's intellectual property by means of using an "Intel Head File" in its DN series voice cards and assisting users to obtain or deliberately violate the protocols of this file, Dongjin initiated a counter-lawsuit against Intel, challenging Intel's technological monopoly in China, so as to impede the technological advancement by using its software permission protocol. Finally, in 2007, this IP-antitrust dispute between Intel and Dongjin was settled.
[28] *Sichuan Dexian v. Shanghai Sony Suoguang Electronics*, (2004) Huyizhongminwuchuzi No.223, (2004）沪一中民五（知）初字第 223 号. In 2004, Dexian brought a lawsuit against Sony Shanghai Suoguang Electronics, alleging that Sony abused its dominant position by tying its intelligent recognition technology with its digital products. In 2007, the Court found no abusive behaviour, and dismissed Dexian's claim.
[29] Kong Xiangjun & He Zhonglin, 'Establishing China's Anti-Monopoly Civil Litigation Regime', in Report on Competition Law and Policy of China 2010, 24-25 (China Society for World Trade Organization Studies ed., Law Press Beijing, 2010)
[30] For example, in *Dexian v. Sony*, (2004) Huyizhongminwuchuzi No.223, (2004）沪一中民五（知）初字第 223 号, the plaintiff failed the case because of the lack of convincing evidence that Sony abused its intellectual property right to restrict the competition in the battery market. In *Dongjin v. Intel*, (2005) Gaominzhongzi No.1379, (2005 高民终字第 1379 号), the plaintiff withdrew the case after a settlement was reached by the parties.
[31] The Consumer Protection Law was firstly adopted in 1993, then it has undergone two amendments respectively in 2009 and 2013.
[32] The Pricing Law was adopted in December 1997 and effective in May 1998.

Bidding Law[33] which specifically forbade bid-rigging behaviour.

As regards private enforcement, the laws mentioned above followed the same model as the AUCL 1993: civil liabilities on the part of the defendant, and the right of victims to compensation, were generally provided by the respective laws. But the lack of detailed procedural provisions made the victim's rights difficult to vindicate, because the victims tended to confront immense hurdles when challenging anticompetitive behaviour, for example, the need for undertaking complicated economic analysis in the assessment of anticompetitive behaviour; the information asymmetry between consumers and business operators; and low participation rates in the scenario of low-value mass harm claims.

Overall, prior to the 2007 AML, the fragmentation not only existed in competition legislation, but also in the enforcement of the competition rules. Although the damages action was allowed to be brought against limited categories of anticompetitive behaviour, which were dispersedly provided in different laws, the lack of a uniform damages mechanism specifically for competition infringements, created great obstacles to access to justice for victims of anticompetitive behaviour.

2.2 The AML 2007

The AML 2007 is the first comprehensive statute regulating competition issues in China[34], adopted by the top-level legislature, the National People's Congress. The Law totally consists of 57 provisions, laid down in eight chapters. The first chapter sets out the basic provisions, including the objectives of the Law, its application and scope, fundamental principles, the arrangement of enforcement authorities, and the definition of the key elements.

However, a criticism of the AML is that because the AML uses quite general and vague language, the provisions of the AML can only serve as a legal base for some key matters, like the damages action, and it is assumed that more implementing regulations or judicial

[33] The Tender and Bidding Law was enacted in August 1999, and came into force in January 2000.
[34] Qian Hao, 'An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution', in Caroline Cauffman & Qian Hao(eds), *Procedural Rights in Competition Law in the EU and China*, (China-EU Law Series 3, Springer 2016).

interpretations are needed to supplement the AML, in order to effectively enforce the Law.

The use of such general language is partly due to the controversy among the legislature and scholars, and uncertainty as to how to deal with important competition issues. Triggered by the requirement of legislative modernisation and the pressure from the China's efforts to accede to the WTO, the drafting of the AML started from 1994.[35] During the more-than-a-decade-long drafting process, intense debates arose as to the necessity and scope of application of the AML; how to organise enforcement among the administrative agencies; and how to regulate administrative monopoly.[36]

Regarding the enforcement mechanism provided by the AML, the debate *focused on its administrative enforcement* by three agencies, namely the State Administration of Industry and Commerce (SAIC), the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM).[37] These three agencies had been vying for authority to regulate competition issues, and asserted their respective authority over competition policy. The outcome of the turf war among the agencies is that the SAIC is responsible for behavioural issues in the market, such as restrictive agreements and abuse of dominance; the NDRC has authority over matters regarding price; and MOFCOM is in charge of merger control.[38]

In contrast, the private enforcement element of the AML, specifically the private damages action, was relatively disregarded by the legislature and the public during the AML drafting process. This led to procedural gaps emerging in terms of the antitrust damages action. There is only one general provision, namely Article 50 of the AML, which simply allows the victims

[35] For details of the drafting process of the AML, see Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolter Kluwer Law & Business 2014) 25.
[36] For the comments on the debate over the AML, see Bruce M. Owen, Su Sun & Wentong Zheng, 'China's Competitin Policy Reforms: The Anti-Monopoly Law and Beyond', 75 Antitrust L. J 233-236 (2008); Qian Hao, 'An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution', in Caroline Cauffman & Qian Hao(eds), *Procedural Rights in Competition Law in the EU and China*, (China-EU Law Series 3, Springer 2016).
[37] It is worth noting that a very recent organisational reform of State Council might change the landscape of public enforcement of the AML. Under this reform, a new national department, that is, the State Administration and Supervision of Market, is established in March 2018. This department will be the sole enforcement authority of the AML. However, since the effectiveness of public enforcement of the AML by this new authority remains unclear due to its very recent adoption, the relevant discussion on public enforcement of the AML is restricted to the previous pubic enforcement model, namely the joint enforcement by the NDRC, SAIC, and MOFCOM.
[38] Under Article 10 of the AML, the three agencies are designated by the State Council as the Anti-Monopoly Enforcement Authority with respect to their respective previous functions with respect to competition issues.

to bring civil actions to claim compensation for their losses.[39]

Although Article 50 has been regarded as granting the right to damages to victims[40], it is still far from a sound mechanism on which to base antitrust damages litigation. A sound mechanism should be an overall complete system in which the different relief measures coordinate with each other, on the one hand, and on the other hand the relief measures work in coordination with its complementary measures, to make the system effectively perform[41], so as to better serve its purpose.

A sound antitrust damages mechanism, specifically, should provide not only for different types of civil remedies, like damages, *but also the procedures to obtain such remedies*, for example, the method of quantifying damages, burden of proof, and the collective redress mechanism. The mechanism should function not only to facilitate the initiation of damages claims, but also to effectively achieve full compensation, which is justifiably set as the court's goal in the antitrust damages actions.

In addition to the over-general language of Article 50, the problem was compounded by its silence as to whether antitrust damages liability can be incurred by government agencies for their administrative abusive behaviour restricting market competition. Anticompetitive behaviour by administrative monopolies[42], which was intensely debated during the legislative process for their potential to do widespread and substantial harm to the Chinese economy[43], was ultimately categorised as one type of prohibition in Chapter 5 of the AML.[44] This chapter expressly prohibits several typical types of administrative anticompetitive behaviour, for

[39] Art.50 of the AML provides that undertakings that implement monopoly conduct and cause damages to others shall bear civil liabilities in accordance with the law.
[40] Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolter Kluwer Law & Business 2014).
[41] Dai Bing & Lan Lei, *Comparative Study of Antitrust Civil Remedy System*, (in Chinese) (Law Press China 2010) 377.
[42] Administrative monopoly refers to the anticompetitive behaviour conducted by government agencies through abusing their administrative authorities, which is specifically referred to a series of behaviour prohibited by Chapter 5 of the AML, for example, abusive administrative authorities may adopt some protectionist or discriminatory regulations, so as to restrict competition. In China, some administrative monopolies are realized through granting special or exclusive rights to private undertakings, which can then engage in private/public hybrid anticompetitive behaviour. And there are some administrative monopolies which are realized through their affiliates, for example, SOEs.
[43] For comments on the debate concerning administrative monopoly, see Jingyuan Ma, 'Market Integration as the Goal of Competition Law: The EU Experience and its Implications for China', in Niels Philipsen, Stefan E. Weishaar & Guangdong Xu(eds), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, (China-EU Law Series 2, Springer 2016) 15-39; Qian Hao, 'An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution', in Caroline Cauffman & Qian Hao(eds), *Procedural Rights in Competition Law in the EU and China*, (China-EU Law Series 3, Springer 2016).
[44] Chapter 5 of the AML, titled 'Prohibition of Abuses of Administrative Powers to Restrict Competition'.

example, the illegal designation of the trading by administrative agencies; regional discrimination; and discriminatory conditions in bidding activities.[45] The last catch-all provision in this chapter generally forbids the enactment of anticompetitive administrative documents through abusive administrative behaviour.[46]

Regarding how to enforce Chapter 5 of the AML, the Law provides a very weak enforcement model, under which the competition enforcement agencies *have no authority* over administrative monopoly.[47] Instead, the superior agency of the defendant has authority to investigate and punish. However, it remains unclear as to the procedure of investigation, or the types of punishment imposed on the defending agencies.

Moreover, the Law is silent as to whether and how individuals could bring damages claims for losses arising from such state-sourced monopolies. For this, some commentators predicted that the ineffectiveness of the AML's enforcement against administrative monopoly would undermine the AML enforcement system as a whole.[48]

Overall, in terms of private enforcement of the AML, although the Law provides a legal basis for individuals and entities to bring civil actions and claim damages in respect of private anti-competitive behaviour[49], the lack of specific procedures for seeking damages, and the gap in the right to damages for antitrust activities by administrative monopolies[50] have rendered the compensation goal of AML damages actions difficult to achieve.

2.3 The 2012 Judicial Interpretation

With the increasing number of antitrust damages cases coming before the courts since 2007, in May 2012, the Supreme People's Court, in response to the failure of the AML to effectively deal with civil actions, published the Judicial Interpretation on Several Issues Concerning the

[45] Art.32-36 of the AML.
[46] Art.37 of the AML.
[47] Art.51 of the AML.
[48] Jingyuan Ma, 'Market Integration as the Goal of Competition Law: The EU Experience and its Implications for China', in Niels Philipsen, Stefan E. Weishaar & Guangdong Xu(eds), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, (China-EU Law Series 2, Springer 2016) 15-39.
[49] Private anticompetitive behaviour is referred to the anticompetitive behaviour conducted by privately owned business in China, as opposed to administrative monopoly.
[50] See f.n.42.

Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct (herein after "the 2012 Judicial Interpretation").[51]

The 2012 Judicial Interpretation provides guidance not only for the courts' precise application of the AML; but also, on undertakings' compliance with the AML, and avoidance of the legal risks in their business operations and on consumers' initiation of antitrust litigation.

The drafting and issuance of the Judicial Interpretation went through an extremely lengthy process. The SPC started the drafting in 2009, at the initial stage of the AML's implementation. After numerous rounds of amendments, the SPC released the draft of the Judicial Interpretation for public consultation on 25 April 2011.[52] During the public consultation, the drafters observed some new trends from the antitrust cases brought around that time. In terms of sectors, in addition to the traditional industries, such as power, telecommunication, and postal service, there had been increasing litigation in the high-tech arena relating to the intellectual property protection. As to the types of anticompetitive behaviour, there has been a tendency towards diversity. Although the abuse of dominant position and anticompetitive agreements still account for the background to the most antitrust damages actions, the damages action arising from vertical agreements was firstly brought before the Court in 2011.[53] As to the amount of damages awarded, the traditional symbolic small claims reduced, and the litigation seeking larger amount of compensation increased.[54]

Due to these new features of the antitrust damages claim in China, although the Judicial Committee of the SPC approved the Judicial Interpretation on 30 January 2012, the final text of the Judicial Interpretation was not released to the public until more than three months later. The extraordinarily long drafting process, and delayed issuance, might indicate that the Judicial Interpretation raised exceptional debates and disputes during its drafting process, and that the

[51] Provisions on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct was adopted by the Meeting of the Judicial Committee of the Supreme People's Court in January 2012, and came into force in June 2012. Judicial Interpretation [2012] No.5.
[52] The consulting drafts of the Judicial Interpretation, available at: http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm, accessed in December 2016.
[53] *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.,* (2012) 沪高民三(知)终字第 63 号.
[54] For the details of the discussion as to the consulting draft for relevant discussion, available at: http://www.360doc.com/relevant/200369286_more.shtml, accessed in December 2016.

SPC showed a prudent attitude towards the Judicial Interpretation in terms of its content and timing.[55]

The 2012 Judicial Interpretation not only fills in some procedural gaps regarding the damages actions; but it also sheds light on how China's Tort Law, Contract Law and Civil Procedure Law may apply in antitrust damages cases.[56] Compared with its consulting draft released earlier, the 2012 Judicial Interpretation is simplified to 16 articles with approximately 2000 characters in total. By dropping controversial issues[57] and stating only the general principles for some issues, the final version of the Judicial Interpretation is more aligned with existing laws, while ensuring that it remains flexible to deal with the controversial issues that may arise in the future.

Specifically, the 2012 Judicial Interpretation provides the basic procedural elements for the antitrust damages action. For example, it allows the damages action to be brought on either a stand-alone or follow-on basis.[58] The qualified plaintiff could be individuals, businesses or any organisations harmed by the anticompetitive behaviour prohibited by the Law, arguably including direct and indirect victims.[59] It also confirms that the intellectual property tribunal[60] of some intermediate courts have jurisdiction over the first-instance antitrust damages actions.[61] When two or more claimants bring two or more claims against the same anticompetitive behaviour before the same court, the competent court may hear the cases together in a single set of proceedings.[62] In addition, the 2012 Judicial Interpretation permits expert opinion as an independent type of evidence[63]; the rebuttable presumption of dominant

[55] Interview with IP Judges of the SPC regarding the drafting process of the Judicial Interpretation 2012, available at: http://www.chinacourt.org/article/detail/2012/05/id/516688.shtml, accessed in December 2016.
[56] Preface of the 2012 Judicial Interpretation.
[57] The controversial issues include the passing-on defence; punitive damages; a special procedure for accessing evidence; and damages against administrative anticompetitive behaviour.
[58] Art.2 of the 2012 Judicial Interpretation.
[59] Art.1 of the 2012 Judicial Interpretation.
[60] IP tribunals of intermediate courts in China have capability to deal with complicated antitrust disputes, especially those involving professional economic analysis. More importantly, until 2012, a considerable amount of antitrust disputes in Chinese courts were relevant to intellectual property right.
[61] Art.3,4 and 5 of the 2012 Judicial Interpretation.
[62] Art.6 of the 2012 Judicial Interpretation.
[63] Art.12,13 of the 2012 Judicial Interpretation.

position[64]; damages liability[65]; and limitation periods.[66]

However, despite these basic elements laid down by the 2012 Judicial Interpretation, it remained silent on some important issues that raised intense debate during the public consultation period and drafting process. It is worth noting that although the collective action[67] had been proposed in the drafting process[68], it was dropped in the final version. Instead, it only allowed the joint action[69] to be brought, which is not sufficient to deal with mass harm caused by anticompetitive behaviour. Because anticompetitive behaviour may harm a large number of individuals so that the individual loss may be relatively small and scattered, (while the aggregate losses of all potential claimants may be very large), the unavailability of the collective action for antitrust damages would render the small damage uncompensated, and the competition infringers unjustly enriched under some circumstances.

In addition, simply confirming the right of the claimant to damages, and reasonable costs for investigating and stopping the anticompetitive behaviour, the 2012 Judicial Interpretation fails to provide guidance on how to determine the loss caused by anticompetitive conducts and in particular, the method of calculating the damages.[70] Without a clear and predictable calculation method, the plaintiff might bring inappropriate claims, while others might hesitate to bring the action due to the uncertainty of being fully compensated.

Following the approach of the AML to administrative monopoly, the 2012 Judicial Interpretation only applies to civil disputes arising from non-administrative anticompetitive behaviour[71], and keeps completely silent as to the damages arising from administrative

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[64] Art.10 of the 2012 Judicial Interpretation.
[65] Art.14 of the 2012 Judicial Interpretation.
[66] Art.16 of the 2012 Judicial Interpretation.
[67] According to the 2013 EU Commission Recommendation on Collective Redress Mechanism, (2013/396/EU), a collective action is the action collectively brought by two or more natural or legal person or by a qualified representative entity, to claim cessation of the illegal conduct, or to claim compensation. The discussion of the thesis is limited to the compensatory collective action.
[68] The consulting drafts of the Judicial Interpretation, available at: http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm, accessed in December 2016.
[69] The joint action is the procedure by which the competent court decides to combine the proceedings whose subject matters are the same or similar, into one proceeding, with the consent of parties. The joint action is one type of collective action mechanism, which, in addition, include representative action, opt-in collective proceeding, and opt-out collective proceeding. This will be further considered at Chapter 4 of the thesis.
[70] The SPC Press Release on the Judicial Interpretation, available at: http://www.iptalents.com/html/NewsView.asp?ID=1297&SortID=56&SorttID=32, accessed December 2016.
[71] The non-administrative anticompetitive behaviour refers to the anticompetitive behaviour conducted not only by private undertakings, but also by SOEs, for example, abuse of market dominance obtained through administrative regulation.

anticompetitive behaviour.[72] This has led to insufficient access to justice of the victims of administrative monopoly.

3. Research Questions & Structure of the Thesis

In order to enhance the full compensation goal arguably pursued by the antitrust damages mechanism, the thesis seeks to fill in some procedural gaps of the existing damages litigation mechanism provided by the AML 2007, by focusing not only on some civil procedure issues in dealing with damages litigation arising from private anticompetitive behaviour, but also certain aspects of administrative litigation procedures and substantive issues involved in the damages action against administrative monopolies.[73]

In doing so, the thesis examines the antitrust damages actions system, as well as the state monopoly control and the public procurement damages system of the EU as references. It is noted that the EU model cannot provide a "one-size-fits-all" solution for China because of the different cultural, economic and legal traditions. However, the initiatives recently adopted by the EU could provide good guidance for China to develop a well-balanced antitrust damages system.

The thesis consists of 6 chapters. This introductory chapter provides a historical development of the AML 2007 and its private enforcement, relevant literature reviews, and research methodologies, and identifies research questions and the structure of the thesis.

Research Question 1: What is the primary and direct goal of Antitrust Litigation in China?

Chapter 2 addresses a fundamental issue of the goal pursued by the antitrust damages action. Since the AML 2007 and its 2012 Judicial Interpretation have not expressly confirmed the direct goal of the antitrust damages litigation, this chapter first seeks to verify whether the achievement of full compensation should be the goal of the antitrust damages litigation in

[72] See f.n.42. A significant distinction between pure economic anticompetitive behaviour and administrative monopoly is whether the administrative agency abuses its authority to granting special or exclusive rights to certain private undertakings, or alternatively to discriminating certain private undertakings.
[73] See f.n.42.

China, by looking into the jurisprudence[74] of the EU regarding the antitrust damages action and its primary objective. Secondly, it analyses whether it is the attainment of full compensation that should serve as the primary goal of the damages action *rather than deterrence*, by reviewing the relationship between public and private enforcement of the competition law in the EU.

Research Question 2: Assessment of Methods for Quantification of Damages

Chapter 3 deals with an important aspect of the damages claim--- how to quantify the damages so as to achieve full compensation. When it comes to quantification of damages, a lot of sophisticated statistical and econometric methods have been put forward by economists in the EU.[75] This chapter firstly presents some of these economic methods of quantification of damages, which could provide a useful guidance to the Chinese courts and parties, because these economic methods involve technical issues which would not touch on the sensitive political or legal issues in China. It critically evaluates a significant aspect of the quantification of damages---the scope of the damages set out by the CJEU for the purpose of *full compensation*, and, it explores the relationship between the quantification of damages and fines imposed by the competition authorities.

Research Question 3: Collective Proceedings: is opt-out useful?
Research Question 4: Measures to Incentivising Private Action

Chapter 4 examines the collective redress mechanism in relatively low-value mass antitrust harm situations, particularly for consumers and SMEs, in order to enhance full compensation. This chapter aims to answer two questions: first, whether "opt-out collective proceedings"[76] for competition law infringements will fit well into the current collective action system provided by the Civil Procedure Law 2012 in China? Second, what kind of balanced measures

[74] The jurisprudence includes legislation and case law at the EU level. The legislation includes the Green Paper, the White Paper, and the Directive regarding antitrust damages actions. The CJEU cases mainly include *Crehan*, *Marshall*, *Manfredi* cases.
[75] Oxera report, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', (December 2009), available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> ,accessed in 10-2015.
[76] The opt-out proceeding refers to a procedure in which the claimants with same, similar or related issues of law and fact are automatically included in the relevant class and bound by the judgment unless they actively opt out the class. This will be further considered at Chapter 4 of the thesis below.

could provide consumers and SMEs more incentives to bring collective actions, while avoiding the encouragement of unmeritorious litigation?

In order to answer the questions, the strength and weakness of the current collective action mechanism in China are analysed. Then a comparative approach will be taken with regard to the collective action in China, and recently initiated measures in the UK, which has brought about significant changes to the landscape of collective action for competition law infringements in the UK, and makes UK the main "battlefield" of antitrust collective action in Europe. Specifically, the limited opt-out proceedings will be assessed as to its impact on the competition civil litigation in the UK. The consumers public interest collective action provided by China's Civil Procedure Law 2012[77] and Consumer Protection Law 2013[78] will be critically evaluated.

Research Question 5: Analysing the Approach of the Courts in the Damages Action Against Administrative Monopoly.

Chapter 5 discusses the damages action against administrative monopolies which is a ubiquitous phenomenon in China. The chapter aims to address three issues: first, to determine what approach can courts take to decide whether a particular anticompetitive regulation is justified on grounds of public interest, or whether such regulation amounts to abusive and ultimately illegal conduct? Second, who should assume civil liability for the damages arising from the abuse of administrative monopoly in China? Third, which procedural steps can be taken under the AML to ensure access to the courts, and to ensure that the damages are awarded to the victims of administrative monopoly?

This chapter first gives a historical review of administrative monopoly in China and the relevant enforcement mechanism under the AML. Second, it examines how anti-competitive conduct by States is dealt with under the EU law. In particular, Article 106 TFEU and corresponding case law on anti-competitive measures taken by public undertakings and

[77] The Civil Procedure Law was amended in 2012, which is the currently effective version.
[78] The Consumers Protection Law was recently amended in 2013, which designates that consumer associations can bring representative action before the courts on behalf of consumers.

undertakings to which EU Member States grant special or exclusive rights is critically assessed. Third, it comparatively examines the substantive conditions of the AML which need to be fulfilled for taking a successful damages claim in general, and in particular with the exemption which may be granted in case of certain State anti-competitive actions under Article 7 of the AML, with comparative reference to the approach taken by the CJEU to the exemption granted under Article 106(2) TFEU.

Chapter 6 sets out the conclusions of this thesis.

4. Limitations of the Research

The research has some obvious limitations. When it comes to enforcement of competition law, a combination of public and private enforcement is regarded usually as the "ideal" enforcement model. However, since examining obstacles to private enforcement of the AML is the gist of the thesis, the detailed discussion of public enforcement is outside of the scope of the research, except for the general introduction wherever necessary. It is also noted that arbitration can be an alternative effective way to adjudicate anticompetitive disputes other than by litigation. However, the research is restricted to litigation arising from anticompetitive behaviour.

Under the civil procedural mechanisms in the jurisdictions of the EU and China, the monetary compensation for damages is not the sole type of civil remedy available to address anticompetitive behaviour. Other remedies, such as injunction, are also available for claimants. However, the research is only restricted to the antitrust damages action, other civil remedies are not within the scope of the thesis, because monetary remedy is the most direct and effective way to address the victims' losses, so as to achieve full compensation.

In antitrust damages litigation, the court needs to evaluate substantive elements of anticompetitive behaviour when hearing antitrust damages actions, such as the definition of relevant market, dominant position, and abusive behaviour. These substantive rules are mostly not evaluated by the research, except for the substantive elements relevant to state monopoly control.

The thesis adopts a comparative research approach between China's approach and the EU model. As for the EU aspect, the antitrust damages action is one of areas in which there is a truly uniform EU law[79] on important issues, (though it maintains diversity concerning the civil procedures among the Member States due to procedural sovereignty). The research is generally limited to the discussion of the antitrust damages mechanism at the EU level. The national procedures regarding antitrust damages claims are not included in this research, except for a very recent amendment on competition collective action in the UK, which is included as it is of particular relevance.

5. Research Methodologies

5.1 Comparative Study

Comparative study is the method mainly adopted by this thesis. It is well accepted that when designing the civil litigation mechanism for combatting anticompetitive behaviour in the developing countries, it is not plausible to completely transplant from the mature models of other jurisdictions, like the EU and the US. Instead, the antitrust damages mechanism is deeply rooted in the substantive and procedural rules regarding tortious liability law and civil procedure law of the relevant countries.

However, there has been a tendency among some international organisations, like the WTO and the International Competition Network, to promote the adoption of "international" principles of antitrust law as applying to all jurisdictions all over the world.[80] Moreover, there has been an increasing amount of international cooperation concerning multinational anticompetitive behaviour, like hardcore cartels. These factors have triggered the convergence of the enforcement mechanisms of competition law in different jurisdictions.

[79] Directive 2014/104/EU of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union. [2014] OJ L349/1.

[80] Eleanor M. Fox, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries', in Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michal S. Gal and David J. Gerber(eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012) 278.

Based on this premise, while the reform and the design of China's antitrust damages system could learn some lessons from mature antitrust jurisdictions, at the same time, one also has to be cautious in the selection of an appropriate model for comparative reference.

5.1.1 Adoption of the EU Model rather than the US Model as a Reference

The US, as a mature antitrust jurisdiction in the world, has implemented an aggressive antitrust damages system, such as the class action; triple damages; and contingency fees. This is mainly due to the 1990s Washington Consensus[81], based on which the enforcement of the US antitrust law has primarily relied on private action brought by the victims of anticompetitive behaviour.

Whereas, EU competition law was founded on different premise, which highlights the Internal Market and equal access within this market. In comparison to the US model, the EU's antitrust damages scheme which has been initiated during recent decades, is less robust than that of the US. On this point, the EU's relatively moderate antitrust damages model is more similar to the situation of China. For example, in terms of State Monopoly, in the US it is controlled through a constitutional approach rather than through antitrust law[82]; whereas, in the EU, State monopoly is regulated under Article 106 TFEU, which is usually applied in conjunction with the EU competition law, namely Article 101, 102 TFEU. Such a "seamless" approach to state monopoly control in the EU is similar to the practice of China.

Therefore, comparatively, the EU model is more suitable and practical as a reference for China to reform and improve its antitrust damages system.

5.1.2 Comparability of the EU and China in terms of Antitrust Damages

The fact that EU competition policy influenced the drafting of the AML means that it makes a lot of sense to compare the antitrust damages mechanisms of the EU and China, and further

[81] Washington Consensus was first put forward by John Williamson in his book in 1990 for policy reform in Latin American. The base of Washington Consensus is conservative philosophy that discard any sort of government intervention. Its corresponding policies focused on increasing aggregate efficiency. It assumed that only the market could increase aggregate efficiency. Afterward, the US antitrust law reflects its policy and assumptions.

[82] The US adopts separate laws governing public and private restraints. The Commerce Clause of the US Constitution prohibits the States from adopting and maintaining measures restricting competition among the States, while the private anti-competitive behaviour is subject to the Sherman Antitrust Act. Under the US Commerce Clause, the states may not impose discriminatory burdens on non-local enterprises.

examine the EU's experience in order to improve the antitrust damages system in China. More importantly, the leading Member States of the EU, such as Germany and France, belong to the civil law system, which is also used by China. This has in turn caused EU competition law approach to share more features of civil law system, which provides a good reason for China to look to the advanced experience of the antitrust damages action in the EU for inspiration.

Another major similarity between the EU and China is that market integration has been set as a key objective to be pursued by both jurisdictions. Competition law has played a crucial role in establishing an integrated market in the EU and China. In the EU, market integration has been regarded as an important principle of Competition Law, because Competition Law seeks to eliminate restrictive behaviour which may undermine market integration.[83] In China, the AML seeks to regulating administrative monopoly, by breaking down regional discrimination and protectionism,[84] in order to achieve market integration within China.

More importantly, regarding the enforcement of competition law, the EU and China have taken the same dual-track enforcement model, including the combination of public and private enforcement. Moreover, in both jurisdictions, the competition authorities have been playing a major role in investigating and punishing anti-competitive infringement, whereas, private enforcement has been regarded as a complement to public enforcement, (though it is being increasingly viewed as an independent enforcement tool of EU competition law[85]).

However, despite these similarities, there also exist significant differences between the EU and China, in terms of competition culture, legal tradition, economic and judicial system. Among these differences, the first important difference is that the EU States have adopted the market economy model, whereas in China an economic transition has been taking place, to gradually move China from a highly centrally planned economy to China's own version of the market economy. Accordingly, SOEs[86] have continued to occupy a dominant position in the Chinese

[83] Since 1951 the Treaty of Paris, the EU Treaties have been seeking to integrate the common market, for example, the Treaty of Rome 1957, the Treaty on European Union, the Treaty of Amsterdam, and the Treaty on the Function of the European Union. Also see Hawk BE, 'Antitrust in the EEC---the first decade', Fordham Law Rev 1972, 41(2), 229-292.
[84] Chapter 5 of the AML 2007, titled 'Prohibition of Abuses of Administrative Powers to Restrict Competition'.
[85] Patrick L. Krauskopf and Andrea Tkacikova, 'Competition Law Violations and Private Enforcement: Forum Shopping Strategies', G.C.L.R.2011, 4(1), 26-38.
[86] SOEs refer to the state-owned enterprises, which are owned or financially controlled by the central and local government. In China, the SOEs, in addition to making profit, also serve some public social functions and significant policy goals, such

economy. The second is that China has no tradition of separation of powers, i.e., the legislative, judicial and administration functions, which has prevailed in European States. The degree of independence of the judiciary is significantly lower than European Union and its Member States. This has to some extent impacted upon enforceability progress of China's reformed competition policy.

It is these similarities and differences that make the two regimes comparable and provide a basis for further proposals for the enhancement of the antitrust damages system in China in this thesis.

Overall, the comparative study provides a fascinating opportunity for mutual learning, whereby on the one hand experience of the EU may inspire Chinese academics and policymakers, and on the other hand, the richness of policy experiences and developments in China may inform academics and policymakers in the EU.

5.2 Historical Research

In addition, the historical research method will also be used. The development of competition law in China is historically presented in the Introduction to the thesis. In the following main chapters, the thesis historically reviews various legislative developments affecting antitrust damages litigation, specifically the legislation on collective action and regulations affecting administrative monopoly. The research on how the legislation and regulations have evolved over time helps to ascertain which reforming direction should be taken to bolster private enforcement under the AML 2007.

as, optimising resource distribution; promoting technological advances; updating industrial structure; and balancing regional economic development. The reform of the SOEs in China, starting in 1979, has significantly improved the corporate governance of the SOEs, e.g., to make them subject to the Company Law of China. For the SOEs controlled by central government, the State-owned Assets Supervision and Administration Commission of the State Council has exclusive regulatory authority. One of the recent reforms is to include the SOEs into the scope of the AML's regulation, which could greatly enhance the innovation of SOEs by fully taking part in market competition.

6. Literature Review: Antitrust Damages Actions in China----An Area to be Enhanced with reference to the EU's experience

Since the AML was enacted in 2007, the aspects of damages litigation under Article 50[87] of the AML have begun to attract increasing attention from the public and scholars. Because of the general nature of Article 50, it only serves as a legal basis for antitrust damages actions, but cannot satisfy complex antitrust litigations in practice. Although a Judicial Interpretation regarding antitrust civil litigation was issued in 2012, it does not settle all ambiguities, and gaps in the antitrust damages mechanism remain as yet unclarified in China.

In the EU, the serious discussion, among the scholars, concerning the legal framework of antitrust damages at the EU level started around from the *Crehan* case[88] in 2001. These discussion and debates significantly contributed to the final adoption of the EU Damages Directive[89] in 2014.

This section reviews the main literature regarding the relevant aspects of antitrust damages action in China and the EU, and provides the very context for this research.

6.1 Objectives of the Antitrust Damages Action

In a research article by Wang Jian (2010),[90] in order to propose a proper private enforcement model for the AML in China, a comparative study of private enforcement of competition law between the EU, US and Japan was conducted. The author found that comparatively, the EU model would be most suitable for China, because China has faced some similar problems like the EU in terms of private enforcement. For example, both shared undeveloped private enforcement, and the issue of uncertain legal basis at the early stage. Meanwhile, that author

[87] Article 50 provides that undertakings that implement monopoly conduct and cause damages to others shall bear civil liabilities in accordance with the Law.
[88] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.
[89] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014.
[90] Wang Jian, 'Improvement of Private Enforcement of the AML in China', (Chinese article), Fa Shang Yan Jiu, Issue 3, 2010.

criticised the single damages rule of the EU model for its lack of deterrence, thus, that author concluded that strong deterrence, for example, by means of double damages, should be introduced into the private enforcement of the AML.

The limitations of this article lie in that, first, it ignored the deterrent effect of public enforcement in both the EU and China. It failed to consider the relationship of public and private enforcement, and their functions in competition law enforcement system, which are respectively deterrence and compensation; secondly, there generally exists no legal basis in Chinese civil law system for punitive damages.[91]

Another Chinese scholar, Fang Xiaomin's work (2007)[92] also contributed to the improvement of private enforcement of the AML 2007, by referring to the private enforcement of the EU competition law. The research focused on damages as an important remedy for private enforcement of competition law. Examining the functions of private enforcement, it found that private enforcement could not only optimise the enforcement mechanism of competition law, but also effectively protect the interests of consumers and SMEs by facilitating the attainment of compensation for their harms. Moreover, it also pointed out that private enforcement, as supplementary to public enforcement, would have extra deterrent effect on anticompetitive behaviour, in addition to the deterrence and punishment functions pursued by public enforcement.

Compared to Wang's work, Fang took a more comprehensive approach to the functions of private enforcement, which considered the overall enforcement mechanism of competition law, rather than looking at the private enforcement separately. Fang's finding properly supports the view of this thesis, that is, in China, compensation is the primary goal of the private enforcement of the AML; meanwhile, private enforcement might have deterrent effect on infringements, but deterrence should not be actively pursued by private enforcement as a goal.

In contrast, the book[93] by another two Chinese scholars, Dai Bin and Lan Lei (2010), compared

[91] Punitive damages are only applied to certain product liability to injured consumers, for example, Art.49 of the Consumer Protection Law 1993.
[92] Fang Xiaomin, 'The Private Enforcement Mechanism of the EU Competition Law------the Lessons for China', in Wang Xiaoye(ed), *Hotspots of Chinese Antimonopoly Legislation* (Social Sciences Academic Press China 2007) 203.
[93] Dai Bin & Lan Lei, *Comparative Study of Civil Remedies system for Antitrust Law* (Law Press China 2010).

the civil remedies system for competition law in the EU, North America and Tai Wan district. Regarding the objective of the damages action, Dai et al. took the view that the damages, under the general civil law principles, is to achieve corrective justice, namely compensation; whereas the damages' purpose is to deter and punish the competition infringements as the primary goal; and to compensate for losses as the secondary goal. Dai et al. assumed that the objective of antitrust damages litigation should be coordinate with the overall objectives of competition law enforcement, which are to prevent the competition infringement and to further protect competition in the market.

The limitation of Dai et al.'s analysis lies in its disregard of the deterrence goal pursued by public enforcement of competition law. Combined with the deterrence effect already achieved by public enforcement, the fact that deterrence would serve as the primary goal of damages litigation could lead to over-deterrence.

The decades before the EU 2014 Damages Directive[94] witnessed heated debate among the European scholars as to the objective of private enforcement of the EU competition law. The research by Paolisa Nebbia,[95] explored the primary aim underlying the damages claims for the infringement of EU competition law in terms of case law and legislation. Nebbia found that uncertainty as to the primary aim of private enforcement arose from a confused reading of what exactly 'effectiveness' means. Examining the roots of the *Crehan* case[96], in which the CJEU explicitly relied upon the 'effectiveness' principle, Nebbia found that *Crehan* decision relies on the notion of 'effective judicial protection' rather than "effective enforcement". In the research, Nebbia also found that, with respect to the question of standing and passing on, the US solution simply cannot be transplanted to the EU on the ground that the priority of the EU is to be granted to 'compensation', and that author further argued that the issue of unjust enrichment may arise from granting standing to all purchasers and prohibiting the passing-on defense. Finally, Nebbia concluded that while the rationale behind damages claims is compensation rather than deterrence, the increasing use of the expression 'private enforcement'

[94] Directive 2014/104, OJ L349/1
[95] Paolisa Nebbia, 'Damage Actions for the Infringement of EC Competition Law: Compensation or Deterrence?', (2008) 33(1) E.L. Rev.23-43.
[96] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.

shows that the rationale has changed since the adoption of the Green Paper 2005.[97]

The author's analysis makes sense in that the priority given to one or other rationale may affect the policy choice on many issues, such as the passing-on defence and the standing of indirectly affected consumers. The observation that priority is granted to compensation is correct on the basis of the Commission's position. The Commission's White Paper 2008 recommends retaining the 'passing-on' defence, which is consistent with the European tradition of treating damages as compensation, as opposed to punishment or deterrence. At the same time, it proposes a partial change in the burden of proof to assist indirect purchases: such a claimant would benefit from a rebuttable presumption that the entire overcharge was passed on to him. In addition, the CJEU also held that the objective of antitrust damages action is compensation in its *Manfredi*[98] and *Crehan*[99]cases.

From a different perspective, Crane (2010)[100] noted that due to the time gap between planning an antitrust infringement and delivery of the judgment of court, damages actions, especially the stand-alone actions, could contribute little to deterrence, because there are "high managerial turnover rates" in mature economic system.

But some scholars hold a somewhat different view. For example, Kai Huschelrath and Sebastian Peyer (2013)[101] argue that compensation works only if the civil remedies are designed to recover certain types of loss. They further took a view that the compensation theory is based on a narrow definition of private enforcement, which has ignored a good part of cases being brought before the courts. They assumed that in addition to the compensation goal, private litigation also contributes to the deterrence effect of all enforcement actions.

Recognizing the full compensation as the primary objective of private enforcement, Renato Nazzini (2011)[102] went further to discuss the relationship between the full compensation

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[97] The Green Paper on Damages actions for Breach of the EC Antitrust Rules, COM(2005) 672 final.
[98] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619.
[99] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.
[100] Crane D.A., 'Optimizing Private Antitrust Enforcement', 2010, 63 Vanderbilt Law Review 675-723, 677.
[101] Kai Huschelrath & Sebastian Peyer, 'Public and Private Enforcement of Competition Law -----A Differentiated Approach, ZEW Discussion Paper No.13-029, available at: http://ftp.zew.de/pub/zew-docs/dp/dp13029.pdf, access in November 2016.
[102] Renato Nazzini, 'The Objective of Private Remedies in EU Competition Law,' G.C.L.R. 2011,4(4), 131-146.

principle and the principle of full effectiveness of EU law, in terms of the compatibility of national law with EU law. Nazzini found that the two principles constitute "the fundamental structure of the right to damages" for breach of EU competition law. Furthermore, that author agreed with the CJEU's position that full compensation is the minimum requirement to achieve the full effectiveness of EU competition law,[103] though Nazzini did conclude that, although the two principles mostly point to the same direction, they are in conflict with each other in some cases, where a kind of trade-off is required.

Due to the coexistence of different national procedural rules concerning the right to damages for EU competition law breaches, the principle of full effectiveness of EU law is a good design to maximize the harmonization of antitrust damages mechanism among the Member States. The focus of Nazzini's research is on the evaluation of the compatibility of national procedural rules on antitrust damages with EU law, in order to ensure the effective enforcement of EU competition law.

In 2014, the EU Council formally adopted the Damages Directive, in which full compensation has been established as the primary objective of antitrust damages actions, and overcompensation by means of multiple damages is expressly forbidden. However, the discussion about the function of private enforcement in conjunction with public enforcement is still ongoing. Ioannis Lianos, Peter Davis and Paolisa Nebbia (2015)[104] found that punitive damages and fines cannot be combined due to the principle that a wrongdoer cannot be punished twice for the same wrong. By referring to the existing observations, Lianos et al. concluded that in the jurisdictions where the public and private mixed enforcement model is adopted, like the EU, a separate-task approach should be taken, under which public enforcement and private damages actions are differently assigned the tasks in which they are better at engaging, namely, the advantage of damages action is to compensate, whereas, the public enforcement aims at deterrence and punishment.

[103] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619.
[104] Ioannis Lianos, Peter Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 231.

6.2 Quantification of Damages in Antitrust Cases

The book, *Competition Law in China*,[105] by Xiaoye Wang and Jessica Su (2014), makes a comprehensive introduction to the AML and its enforcement. They found that according to Chinese Civil Law Principles, the scope of civil damages includes actual losses, and arguably the anticipated loss. They further found that punitive damages are generally not available in China, except for the product liability imposed on manufacturer.[106] Observing the drafting process of the AML Judicial Interpretation 2012,[107] they found that punitive damages for hard-core cartels; the mitigated damages for leniency applicants; and statutory damages when it is difficult to prove actual losses, were all proposed to facilitate the quantification of damages. But the final draft of AML's Judicial Interpretation 2012 failed to accept these proposals, only confirming that the reasonable expenses and costs spent on investigation and prevention of the anticompetitive actor's behaviour, upon the request of plaintiff, could be calculated into the antitrust damages.

This book, as an overview of the AML 2007, only generally introduces the existing provisions concerning quantification of damages. It does not really identify the practical problems confronted by the courts and parties when using such a quantification method, and further provides no possible solutions to these problems.

The book,[108] by Dai Bin and Lan Lei (2010), compared the scope of damages under the general civil law principle of some jurisdictions,[109] and found that compensating for all losses, adopted by Germany, France and Tai Wan, would lead to over-compensation, therefore, these jurisdictions have not necessarily adopted punitive damages. Instead, the scope of damages is limited to actual losses and anticipated loss in these jurisdictions. Whereas, the UK and US adopt compensation only for certain losses, usually including actual loss. In addition to actual

[105] Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolters Kluwer Law & Business 2014).
[106] The customers injured by defective product have right to punitive damages, for example, double damages, as provided by Article 55 of the Consumer Rights Protection Law 2013.
[107] Provisions on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct was adopted by the Meeting of the Judicial Committee of the Supreme People's Court in January 2012 and came into force in June 2012. Judicial Interpretation [2012] No.5.
[108] Dai Bin & Lan Lei, *Comparative Study of Civil Remedies System for Antitrust Law* (Law Press China 2010).
[109] The observed jurisdictions include the US, Canada, the EU, UK, Germany and Taiwan.

losses, Dai et al. found that considering the time value, the payment of interest on damages should be calculated into the scope of damages. They further found that the different methods of calculating interest would lead to dramatically different amounts of damages, and even could make the single damages a huge amount which is much more than nominally punitive damages.

In addition to actual loss-based calculation, they found that the calculation of damages can also be based on the illegal profits of defendant when actual losses are difficult to prove, and further assumed that the claimant could choose between actual loss-based and illegal profits-based calculation. They further summarised the actual loss-based methods of calculating damages adopted by different jurisdictions, including before-and-after method, yardstick method, cost-based method, market-share method, price prediction and simulation.

Since Dai et al. assumed that the primary goal of antitrust action is deterrence and punishment, they proposed that punitive damages be adopted to deter future infringements. But punitive damages have the potential to achieve over-deterrence,[110] since public enforcement also pursues deterrence, which was disregarded by Dai et al.'s research.

In Europe, Oxera, with a group of lawyers and economists specialized in antitrust cases, conducted a research, and ultimately produced a report concerning quantification of antitrust damages.[111] Recognising the principle of full compensation established by EU case law, the report stressed that the scope of compensation includes the actual loss, loss of profit, and the interest from the time the damages occurred until the capital sum awarded is actually paid. Then the report, using economics, developed a series of economic methods and models of calculating the antitrust damages, which are classified into three broad categories: comparator-based, financial-analysis-based, and market-structure-based methods. Furthermore, the report presented how to apply these methods and models to different types of anticompetitive behaviour, for example, the hard-core cartel, exclusionary conducts, and exploitative abuses of dominance. This report demonstrated the combination of economics and competition policy.

[110] Directive 2014/104, OJ L349/1, recital (13).
[111] Oxera Report prepared for the European Commission, 'Quantifying Antitrust Damages Towards Non-Binding Guidance for Courts', December 2009, available at: https://www.oxera.com/Latest-Thinking/Publications/Reports/2010/Quantifying-antitrust-damages-Towards-non-binding.aspx, accessed in November 2015.

But the report also stressed that the amount of damages calculated from these economic methods and models are not accurate, and the degree of accuracy to some extent depends on the quality and completeness of the relevant data and information obtained from the real world.

Following the Oxera report, the EU Commission published a Practical Guide regarding quantification of antitrust damages,[112] which included the economic methods and techniques summarized by the Oxera report. Meanwhile, the Practical Guide demonstrates how to quantify the harm caused by price rise, and how to quantify the harm to competitors and customers. More importantly, it also mentioned the possibility of compensation for future losses, which is similar to the concept of anticipated losses pointed out by Wang's work.[113] Such concepts, as future loss, anticipated loss, would make a great contribution to full compensation.

The Directive[114] governing antitrust damages action, recognised the full compensation principle, defining the scope of compensation as the actual loss, loss of profit and the payment of interest. The Directive 2014 is very cautious about the scope of damages due to the concern of overcompensation. But a question arises as to whether such three heads of damages provided by the Directive 2014 can satisfy the requirement of full compensations. Therefore, it is argued that the scope provided by the Directive 2014 should be regarded as a minimum requirement of compensation, which is arguably far from the full compensation in some situations.

The following research works by George Cumming, Brad Spitz and Ruth Janal(2007), Mark Brealey QC and Nicholas Green QC (2009), Lianos et al. (2015), have made a significant contribution in terms of the calculation of antitrust damages.

Cumming et al. (2007)[115] conducted research as to the forms of compensation in French antitrust procedure. They found that in terms of full compensation, French rules on competition litigation follow the EU approach. Moreover, due to the compliance with the general principles of French law, the French courts may not award punitive damages. However, given the certain

[112] The Commission Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU, C (2013)3440, Strasbourg, 11-6-2013.
[113] Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolters Kluwer Law & Business 2014); also see Wei Zhengying, *Civil Law*, (Chinese version) (Beijing University Press, 2000) 724.
[114] Directive 2014/104, OJ L349/1.
[115] George Cumming, Brad Spitz and Ruth Janal, *Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts* (Kluwer Law International 2007) 207.

and direct injury, the types of injury which can be compensated include future injuries, material, moral, loss of amenities, loss of profits, a loss of chance, etc. Victims must be able to recover entirely the damages suffered, even though punitive damages are not available in French law, in order to facilitate damages claims. They further found that where it is difficult to quantify the damages, the Civil and the Commercial Courts and the Court of Appeal do not have to explain accurately how they quantify the damages, due to the exclusive jurisdiction of the courts as to quantification of damages.

Brealey et al.[116] focused on the methods used by the UK courts and the Competition Appeal Tribunal (the CAT) in order to quantify damages. They employed diagrams and illustrative examples to demonstrate the use and benefits of different techniques, such as yardstick method, linear and multiple regression analysis. They found that in addition to the techniques based on the compensatory principle, the calculation based on the defendant's illegal profits is also possible as a method of quantifying damages, especially when there is no evidence available to estimate the damage caused to the claimant.

Lianos et al. (2015)[117] found that the Member States have been left some room as to the award of punitive damages, as long as in accordance with the EU principle of equivalence, because the Directive does not absolutely prohibit punitive damages; instead, the Directive only prohibits overcompensation by means of punitive damages. Their work is of the view that the punitive damages, in some circumstances, is a proper approach to full compensation. Lianos et al. concluded that the approach taken by the EU Commission has also left room for further discussion as to what else elements should be measured and how to measure these elements, in order to achieve full compensation.

6.3 Collective Redress for Antitrust Damages Claims

The discussion on antitrust collective action is limited to the civil litigation, rather than administrative litigation, in other words, the collective action mechanism is only applied to

[116] Mark Brealey QC & Nicholas Green QC (eds), *Competition Litigation –UK Practice and Procedure* (OUP 2009) Chapter 17.
[117] Ioannis Lianos, Peter Davis and Paolosa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 36,37.

against pure economic anticompetitive behaviour, rather than anticompetitive behaviour conducted by administrative agency, namely administrative monopoly.

As to the types of civil proceedings available for mass harm claims in antitrust cases in China, Wang Xiao ye and Jessica Su (2014)[118] found that the Civil Procedure Law of China provides two proceedings for mass harm situations, including joint action[119] and representative action[120], however, the AML Judicial Interpretation 2012 dropped the provisions on representative action which were contained in the draft Judicial Interpretation. Therefore, it is unclear as to whether representative action is allowed in antitrust civil actions. It is assumed that the dropping of representative action in the final Judicial Interpretation is partly due to concerns over the court's ability to deal with complicated antitrust cases involving multiple claimants.

However, the tendency among jurisdictions around the world is the increasing use of collective redress in antitrust mass claims. As observed by Dai Bing and Lan Lei (2010), the advantages of collective redress in dealing with antitrust mass claims is to improve procedural economy; save access to justice costs; ensure access to justice of indirect purchasers; and achieve the objective of enforcement of competition law.[121]

In addition, Dai et al.[122] further pointed out that the courts in antitrust collective actions have confronted a difficulty in the calculation of the aggregate harm and the individual harm, particularly in "opt-out" proceedings[123]. Comparing the relevant practice in Tai Wan, UK and Canada, Dai et al. proposed that the courts in antitrust collective actions be granted jurisdiction over the adjudication of aggregate damages which can be based on illegal profits of defendant, and then the distribution plan among the individual victims.[124]

In the EU, the proposal of collective redress in the 2008 White Paper,[125] the 2013

[118] Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolters Kluwer Law & Business 2014).
[119] The joint action is the proceeding by which the competent court decides to combine the proceedings whose subject matters are the same or similar, into one proceeding, with the consent of parties.
[120] A representative action refers to the procedure by which representative claimants or defendants are elected by respective parties to conduct the litigation on their behalf, where a joint action has a large number of claimants or defendants.
[121] Dai Bin & Lan Lei, *Comparative Study of Civil Remedies system for Antitrust Law* (Law Press China 2010).
[122] Ibid.
[123] Opt-out proceeding refers to the situation where those harmed by same or similar infringement could automatically join in a litigation group and to be bound by the judgment, unless they actively choose to opt out the group.
[124] Dai Bin & Lan Lei, *Comparative Study of Civil Remedies system for Antitrust Law* (Law Press China 2010).
[125] The Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final.

Recommendation [126] concerning the framework of collective redress, and the recent introduction of opt-out proceedings into the UK antitrust action by 2015 Consumer Rights Act,[127] have triggered heated debate on collective redress among the scholars in the EU.

Sir Gerald Barling (2011)[128] discussed the collective redress system under EU competition law and put forward some proposals to improve collective redress as an important aspect of the antitrust damages actions. Barling pointed out the problem of collective redress in the private enforcement of EU competition law, and considered the existing provisions on collective action in the UK, which were mainly included in the Civil Procedure Rules 1998, and examined the reforming measures put forward by the EU Commission as well as the Office of Fair Trading (OFT) and the Civil Justice Council (CJC) in the UK. Barling found that an opt-out class action would bring a lot of benefits to the collective redress action at least in the UK, though it is not a suitable approach for every case,[129] and should be applied under judicial supervision. In conclusion, Barling predicted that the UK will be in the vanguard in improving procedures of collective redress, and reaffirmed that collective redress would be further promoted through the opt-out proceedings.

The most valuable aspect of Barling's research is the analysis of the benefits of the opt-out model of collective redress. While Barling strongly recommended that opt-out collective action should be used to facilitate collective redress, it was believed that whether the opt-out procedure is applied, or not, depends on the judicial discretion. Thus, strictly speaking, the suitable model to be adopted should be a mixed opt-out/opt-in procedure, but not a solely opt-out collective action. The fact that a particular case should be brought on an opt-in or opt-out basis is to be determined by the court order, will arguably give rise to legal uncertainty, which could deter the victims from filing antitrust collective actions. Moreover, the author did not specifically address the respective circumstances where the opt-out or opt-in procedure should

[126] Commission Recommendation of 11June 2013 on Common Principles for Collective Redress Mechanisms in the Member States for Injunctions against and Claims on Damages caused by violations of EU rights COM (2013) 3539/3.
[127] The Consumer Rights Act, amended in 2015 by UK government, has brought significant changes to the landscape of collective redress for competition law infringement in the UK.
[128] Sir Gerald Barling, 'Collective Redress for Breach of Competition Law----a Case for Reform?' Comp. L.J. 2011, 10(1), 5-20.
[129] The recent UK case, *Mastercard*, [2017] CAT 16, 2017 WL 03128998, 21 July 2017, has revealed a situation for which the opt-out proceeding is not suitable. The situation is that the calculation of individual damages from the aggregate damages has proved very difficult and even impossible.

be applied by the court. In addition, there is no doubt that the calculation of the damages in opt-out collective proceedings is by no means on the basis of the compensatory principle, because the individual damages are usually scattered and low-value, and the distribution of the damages would be quite costly.[130] As to whether the calculation of damages in the opt-out proceedings would be contrary to the compensatory principle which has been regarded as the primary goal of private enforcement of competition law in the EU, the article did not address that issue.

Barry J. Rodger's research (2015)[131] focused on the UK's new collective redress model introduced by the Consumer Rights Act 2015, which remarkably allows opt-out proceedings to be brought before the CAT[132] for competition litigation. Rodger examined the effectiveness of this new model on the antitrust private litigation. He found that the combined application of the CAT Rules on collective proceedings, and the relevant statutory rules, might undermine the effectiveness of new opt-out proceedings for consumer claims.

This is particularly reflected in the appointment of a class representative, and the funding arrangement. As to appointment of the class representative, neither the legislation nor the CAT Rules provide a clear answer as to whether law firms and special purpose vehicles are qualified to act as the class representative. As for the funding arrangement, Rodger found that the potential application of settlement offers in the context of collective proceedings, and the exclusion of punitive damages in collective proceedings, may discourage proper funding arrangements.

Finally, Rodger suggested that instead of fears about the negative consequences of introduction of US-style class action, more trust should be placed in the CAT in exercise of its supervisory role with respect to all aspects of collective proceedings.

[130] Dai Bin & Lan Lei, *Comparative Study of Civil Remedies system for Antitrust Law* (Law Press China 2010) 368.
[131] Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringement in the UK: a Class Act?' Journal of Antitrust Enforcement, 2015, 3, 258-286.
[132] The Competition Appeal Tribunal was established especially for competition cases in the UK.

6.4 Damages Action Against State Monopolies

With increasingly economic liberalization,[133] State intervention in the economy has to comply with competition law, which is specifically provided by Article 106 TFEU at the EU level, and Chapter 5 of the AML in China. However, there have been very limited remedies provided by the AML in China, and Article 106 and its case law in the EU, partly because of the politically sensitive nature of this issue. Accordingly, the existing literature on this subject mainly focused on the substantive aspects and its administrative enforcement.

The administrative monopoly in China, which is described as 'state or government restraints' by some scholars[134], has been always a serious problem in the Chinese economy since economic transition commenced in 1978. The research activities in this field focus on the historic analysis of the administrative monopoly in China, the comparative study with the EU and other transitional economies, like Russia. As to implementation of the provisions on administrative monopoly, a great deal of research work has been dedicated to the public enforcement.

Xiaoye Wang conducted research on government behaviour for purpose of competition law.[135] Wang sought to answer the questions as to what the definition of "undertaking" for the purpose of competition is, and what competition law is able to do in terms of government anticompetitive behaviour, by comparing the relevant theories and practice between the EU and US. Wang found that due to the potential collusion between China's government agencies and SOEs, and even consistency in certain economic interests between them, it would be a common phenomenon that the government abuses its administrative power to restrict competition in the market. Wang concluded that as far as China is concerned, with reference to the EU and US experience, the concept of "undertaking" under the AML needs to be interpreted broadly, so as to include the economic activities of government within the regulatory scope of

[133] Alison Jones & Brenda Sufrin, *EU Competition Law ----Text, Cases and Materials*, (6th edn, OUP 2016) 647.
[134] For example, Eleanor M. Fox, 'An Anti-Monopoly for China---Scaling the Walls of Government Restraints', Antitrust Law Journal, Vol.75, No.1 (2008) p.173-194; Josef Drexl & Vicenta Bagnoli(eds), *State-Initiated Restraints of Competition*, Edward Elgar Publishing, 2015; Jacob S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine', Washington University Law Review, Volume 87, Issue 4, January 2010.
[135] Xiaoye Wang, 'Government Behaviour under the Competition Law', available at: http://www.525free.cn/showArticle.aspx?id=1936, accessed in October 2016.

the AML.

Jacob S. Schneider (2010)[136] also took the same view that the EU's experience in regulating anticompetitive state measures could be instructive for China to implement the administrative monopoly provisions in the AML

However, Guangyao Xu (2014) took a different approach to the analysis of administrative monopoly under the AML.[137] Xu argued that traditional competition law originated from mature market economies, for example, the EU and US, where these exists no strict equivalent to China's administrative monopoly, so China cannot learn lessons from those mature market economies in terms of regulation of state monopoly. Xu conducted a research focusing on Chapter 5 of the AML according to the classification of administrative behaviour under the Administrative Litigation Law of China. Xu found that due to the very limited regulation of administrative behaviour under the Administrative Litigation Law, the enforcement of provisions regarding administrative monopoly is quite weak. He further found that the administrative monopoly provisions in the AML were formulated along traditional legal thinking lines, which left very little room for economic analysis.

Thomas K. Cheng[138] properly pointed out the weakness of the State monopoly control under the AML, by historically reviewing the relevant legislation and examining the implementation mechanism provided by the AML. In particular, Cheng found that there have been relatively few administrative monopoly cases accepted by the court, even though the AML keeps silent as to the right of action against the administrative monopoly. Then he sought to explore a balancing approach to discriminatory administrative measures which restrict competition, by referring to the EU and US relevant experience. Cheng found that the EU's experience on establishing Internal Market could provide positive answer as to the AML's scrutiny of the discriminatory administrative measures. Finally, Cheng concluded that third-party adjudication

[136] Jacob S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine', Washington University Law Review, Volume 87, Issue 4, January 2010, available at: http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1098&context=law_lawreview, accessed in October 2016.
[137] Guangyao Xu, 'Analysis of Administrative Monopoly under the AML',(in Chinese), available at: http://theory.people.com.cn/n/2014/1208/c207270-26167974.html, accessed in October 2016.
[138] Thomas K. Cheng, 'Abuse of Administrative Monopoly in China,' in Josef Drexl & Vicenta Bagnoli(eds), *State-Initiated Restraints of Competition* (Edward Elgar Publishing 2015).

system, as adopted by the EU and US, would be an effective way of regulating widespread administrative monopoly. However, Cheng doubted that the judiciary is unlikely to effectively fight against administrative monopoly because it lacks sufficient independence in China.

Eleanor M. Fox[139] adopted a similar method as Cheng, that is, comparison of the State monopoly control mechanism between China, the EU, US and WTO system. In particular, Fox found that EU law provides powerful remedies against State monopolies, which is demonstrated by the claim for damages by the victims of State monopolies. Fox further observed that if Article 50 of the AML could apply to administrative monopoly, it would be helpful that consumers and enterprises would have incentive to detect and prosecute administrative monopoly. In order to achieve such effectiveness, procedural features of EU law could be exported to Chinese law. For example, regarding the control of State-initiated monopolies (which is governed by Article 7 of the AML), it is suggested that the EU concept of "services of general economic interest" could be introduced into the Chinese system, to better protect the consumers' interest and facilitate technological progress, (which is stipulated by Article 7 of the AML).

In the EU, the research on state-initiated monopoly focuses on the State Aid doctrine, and on the interpretation and application of the key elements of Article 106, such as 'public undertakings', 'undertakings granted special or exclusive right', and 'services of general economic interests'. Mel Marquis[140] examined these key elements of Article 106 TFEU, and critically analysed a recently decided case, *Greek Lignite*[141], around which the views of the Commission, the General Court and the Court of Justice were reviewed. More importantly, based on the analysis of Article 106 TFEU, Marquis suggested building a national competition strategy, including a series of measures and projects for China, to better regulate administrative monopoly, such as introducing the possibility of claiming damages beyond direct losses for administrative monopoly antitrust infringement, and accelerating the judicial independence

[139] Eleanor M. Fox, 'An Anti-Monopoly for China---Scaling the Walls of Government Restraints', Antitrust Law Journal, Vol.75, No.1 (2008) 173-194.
[140] Mel Marquis, 'The State of State Action in EU Competition Law (Post-Greek Lignite) and a National Competition Strategy for China', in Niels Philipsen, Stefan E. Weishaar, Guangdong Xu(eds), *Market Intgregration: The EU Experience and Implications for Regulatory Reform in China* (China-EU Law Series, Vol.2, Springer 2016) 41-96.
[141] Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, EU:C:2014:2083, [2014] 5 C.M.L.R. 19.

process: both are key steps relevant to the establishment of an adequate corrective mechanism for administrative monopoly antitrust infringement..

Buendia Sierra[142], from a different perspective, reviewed the enforcement of Article 106 TFEU by the Commission and the CJEU. Sierra found that the reluctance of the Commission to deal with Article 106 complaints has contributed to the negative implications for in-depth interpretation of this article. However, the CJEU's attitude in *DEI* case[143] has confirmed the Commission's tremendous power under respect to Article 106. Sierra concluded that, with the increasing of protectionism and special rights replacing State Aid, the Commission should play a more role in the enforcement of Article 106 TFEU.

Although the issue of damages remedy for administrative monopoly antitrust infringement in China has been mentioned by several scholars in their works, the existing literature lacks in-depth analysis, and constructive proposals to improve the damages procedures for administrative monopoly: as regards the antitrust damages action in China, most research attention has been paid to the damages action in the context of how to compensate for harm, arising from the private anti-competitive behaviour, rather than from State-appointed monopolies.

Literature Gaps & the Contributions of this Thesis to Filling Some of these Gaps:

Overall, the existing literature on the topic of the antitrust damages action has revealed lots of controversial issues in this area, for instance, the primary goal of the antitrust damages action, the availability of punitive antitrust damages, and collective opt-out proceedings for antitrust damages. The debate among the scholars in the EU could provide rich theoretical resources for the thesis in the following aspects: first, although full compensation has been established as the primary goal of the antitrust damages action in the EU, the debate on the deterrence effect of

[142] Jose Luis Buendia Sierra, 'Enforcement of Article 106(1) TFEU By the European Commission and the EU Courts', in Philip Lowe, Mel Marquis, and Giorgio Monti(eds), *Effective and Legitinate Enforcement of Competition Law* (European Competition Law Annual, Hart Publishing) 279-306.
[143] Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19.

the antitrust damages action is still ongoing. The second is the debate on the pros and cons of the collective opt-out proceedings in the EU, based on which the thesis could make sensible recommendations for China as to whether the opt-out proceedings could be adopted for antitrust damages claims. Third, the discussion among the EU scholars as to quantifying methods and the scope of antitrust damages, and the Chinese scholars' examination on China's general civil law principles on the scope of damages as well as the possible application of punitive damages in China, would provide supportive arguments for the thesis.

It has to be recognised that there exist some gaps in the existing literature regarding the antitrust damages action. Comparative studies of the antitrust damages claim between China and the EU, as well as other jurisdictions, such as the US and Japan, have been conducted by many Chinese and EU scholars. The gaps mainly lie in the availability of opt-out proceedings for antitrust mass harm claims in China, and the procedural aspects of the antitrust damages action against administrative monopoly in China.

The thesis, therefore, seeks to fill these research gaps in the current literature, by first, proposing a workable opt-in/opt-out proceedings in the antitrust mass claim situation, with reference to the UK's recent application of opt-out proceedings in the antitrust damages action; and second, by exploring an effective approach to the antitrust damages action against administrative monopolies in China, from both substantive and procedural perspectives, with reference not only to the application of Article 106 TFEU, but also the EU public procurement damages mechanism.

Chapter 2 The Goals of a Damages Action under the AML

1. Introduction

The purpose of this chapter is to clarify the direct goals of the antitrust damages action for breaches of the AML and the role they should played in the effective enforcement of the AML, since the goals will affect the specific measures and policy choices-making in terms of antitrust private enforcement measures. The objectives provided in the Judicial Interpretation 2012[144] for antitrust damages action are too general.[145] They cannot be achieved directly by the antitrust damages action, and in turn, such ultimate and general objectives by no means provide clear guidance for the construction and application of an effective antitrust damages action system in China. More importantly, the clarification of direct goals actively pursued by the antitrust damages action in China could also provide a benchmark to assess the appropriateness of the specific antitrust litigation measures to be applied in China.

The objectives of the antitrust damages action, as provided by the Judicial Interpretation 2012, are to generally prohibit anti-competitive behaviour, promote market competition, protect consumers' interest and public interest.[146] These mixed objectives are also the objectives of the AML as set forth in Article 1 of the AML.[147] These objectives, are too "general" and "abstract", in other words, they are the macro-level[148] ultimate objectives of the antitrust damages action. However, in order to achieve them, direct and specific goals need to be identified, to better design and apply the antitrust damages measures, for example, quantification of the antitrust damages (*discussed in Chapter 3*), and antitrust collective action

[144] Provisions on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct was adopted by 1539th Meeting of the Judicial Committee of the Supreme People's Court in January 2012 and came into force in June 2012. Judicial Interpretation [2012] No.5.

[145] The provided objectives in the Judicial Interpretation 2012 include the prohibition of anti-competitive behaviour, the promotion of market competition, and the protection of consumers' interests and public interests, which are the ultimate goals of enforcement of the AML.

[146] The preface of the Judicial Interpretation 2012.

[147] Article 1 of the AML provides that this Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy.

[148] The "macro-level" objectives means the objectives to be achieved by the entire AML system and its enforcement mechanism.

(*discussed in Chapter 4*).

First, and the most important, is to establish that full compensation is the primary goal of antitrust damages litigation, in other words, consumers' interest is best protected through *full compensation* for the harm brought by anticompetitive behaviour. In the EU White Paper 2008,[149] full compensation was proposed as a relevant benchmark for private enforcement framework in the EU,[150] and both EU Commission and the case law of the CJEU specify that full compensation is a fundamental principle of the antitrust damages actions, which has also been established under the EU Directive 2014.[151]

The second goal of private enforcement is arguably to achieve optimal deterrence as a complement to the public enforcement of the AML. The goals of eliminating anti-competitive behaviour and promoting fair competition in the market could be better achieved by means of deterrence. In some jurisdictions, like US, where private enforcement is predominant in the enforcement of competition law, private enforcement is very clearly intended to deter future infringement *as well as* to compensate for the harm.[152] But this is not the case in the combined public and private antitrust enforcement systems in the EU and China, where public enforcement plays a central role in the entire enforcement system of competition law, and deterrence is actively pursued by public enforcers. Therefore, a debate as to whether the deterrence should be set as the goal of antitrust damages actions arose in the EU and China.[153] In the EU, although the extent to which the deterrence issue can be placed within the antitrust damages framework is less clear than it was in the US, it is believed that private damages actions contribute to the maintenance of effective competition in the Community by deterring

[149] Commission White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, Brussels, 2.4.2008.
[150] Peter Whelan, 'Something of a Burden – Is the Passing-on Defence Appropriate?', Com.L.I., 23 Sep 2008, 5-7.
[151] Directive 2014/104, OJ L 349/1.
[152] Albert A. Foer and Jonathan W. Cuneo, *The International Handbook on Private Enforcement of Competition law*, (Edward Elgar 2010) 591.
[153] For more discussion on this debate, see Lianos I., Davis P. & Nebbia P., *Damages Claims for the Infringement of EU Competition Law*, (Oxford University Press, 2015)26,30; Renato Nazzini, 'The Objective of Private Remedies in EU Competition Law', G.C.L.R.2011, 4(4), 131-146; Ezrachi A., 'From Courage v. Crehan to the White Paper----The Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation', in Mackenrodt M. et al.(eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, 2008, 118-135; Dai B, & Lan L., *Comparative Study on Antitrust Civil Remedy system,* Law Press China, 2010 (in Chinese); Jiang X.H., 'Private Enforcement Mechanism of the AML', in Wang X.Y.(ed), *Hot Spots of Chinese Antimonopoly Legislation* (Social Science Academic Press China 2007)177-202(in Chinese).

anti-competitive behaviour.[154]

The structure of this chapter will be as follows:

Following the Introduction, the second section examines the existing Chinese legislation concerning the objectives of antitrust damages action. Then the implied goals pursued by antitrust damages action in China will be analysed, with respect to the general civil damages action, and the features of antitrust damages system.

The third section is devoted to the development and interpretation of the goal of full compensation at the regulatory and judicial level in the EU. Full compensation has been set as the primary objective of antitrust damages action by the Directive 2014. Meanwhile, the elaboration regarding full compensation given by the CJEU has contributed some important elements of this goal, which could be very relevant to Chinese court tasked with the estimation of damages awarded to victims of AML breaches, and also to the availability of antitrust collective action as well as damages claim against administrative monopoly in China.

The fourth section of this chapter discusses the role of deterrence[155] played in damages action. The development of the EU's attitude as to the deterrent effect of damages action will be explored. From the EU's experience, a proper level of deterrence to be achieved by private antitrust litigation in China can be decided, considering the realities in China, such as the relationship with public enforcement of the AML, the existing civil litigation system, and the availability of collective action. The questions as to whether the deterrence is one of goals pursued by the private antitrust enforcement and what the level of deterrence can be contributed by antitrust damages action in China, can be answered in order to better construct and apply the specific measures of damages litigation.

The last part makes some recommendations that the full compensation, rather than the deterrence, should be actively pursued by damages action system under the AML. Although

[154] Jones A. and Beard D., 'Co-contractors, Damages and Article 81: The ECJ Finally Speaks' [2002] ECLR 246, 253-5.
[155] Deterrence means preventing effect on companies' future anticompetitive behaviour mainly by increasing the likelihood of being caught, as well as serious sanctions imposed on the violating companies. When making competition strategy, companies' cost-benefit analysis would necessarily include risk and costs caused by anti-competitive behaviour. More discussion on deterrent effect of antitrust damage action, please see *Section 4* of this Chapter.

the deterrence is not a goal of damages action partly due to the concern of over-deterrence, the damages action indeed contributes a certain level of deterrence as complement to the public enforcement. This requires a balanced damages system which not only provide full compensation for the harm of victims caused by anticompetitive behaviour, but also contribute proper level of deterrent effect to the ineffective public enforcement, in order to achieve optimal deterrence.

2. The Goals of a Damages Action Under the AML

2.1 The Statutory Goals ----Some preliminary observations

As provided by the Judicial Interpretation 2012, the goals of the antitrust damages action in China are to *prohibit anti-competitive behaviour*, *protect and promote market competition*, and *protect consumers' and the public interest*.[156] These goals are in line with the objectives of the AML as set forth in Article 1 of the AML.[157]

There is no doubt that prohibition of monopoly, protection of market competition, consumers and the public interest, serve as the fundamental principles of the AML enforcement, in other words, they are the ultimate objectives of public and private enforcement of the AML.

Taking a close look at these objectives in the EU context, it appears that there exists an interplay among them, namely, between protection of the market competition, consumers' interest and the public interest. It is the author's view that the focus on the consumers' interest does not mean that competition law *directly* protects consumers.[158] In the EU, competition rules ensure a fair choice at a fair price of goods, or service of a good quality, they are indirectly promoting consumers' interest in the market.[159] Therefore, consumers' interest is often mentioned as

[156] The preface of the Judicial Interpretation 2012.
[157] Article 1 of the AML provides that this Law is enacted for the purposes of preventing and prohibiting monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the consumers and public interest, promoting the healthy development of the socialist market economy.
[158] This statement is made on the basis of the European Commission Report on Competition Policy (2015), "the *ultimate aim* of competition policy is to make market works better, to the advantage of households and business. For consumers, the efficient and open markets mean better market conditions, such as lower prices, better quality products and services." Also see Eleanor M. Fox & Damien Gerard, *EU Competition law ---Cases, Texts and Context* (Edward Elgar 2017) 3.
[159] Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (Kluwer Law International 2009) 65.

being the ultimate objective of the legal intervention in the area of antitrust.[160] It is argued that competition law achieves the goal of consumers' interest through protection of market competition, which means that market competition is a tool rather than a target.

This EU view is reflected in the prohibitions of the AML, which focus on the *behaviour* of undertakings, and highlights the *protection of competition process*. The protection of consumers' interest pursued by competition law is a kind of indirect, deep-rooted and fundamental protection, in other words, a "maximum" of consumer welfare is achieved through the protection of competition. As Philip Lowe observes, "good consumer and competition policies have one and the same goal, which is to help markets work well for consumers and for all the fair-dealing enterprises that serve consumers well".[161]

As far as the interplay between consumers' interest and public interest is concerned, the AML highlights the protection of consumers' interest, which is distinct from and also has some relationship with public interest. In essence, protection of consumers interest is consistent with the protection of public interest. However, that is not the end of the discussion, because the concept of public interest in the AML is controversial. The consensus as to the definition of public interest has not been reached in many other jurisdictions.[162] Literally, the public interest, which is different from the interests of individual persons and undertakings, or a group and a party, can be interpreted as universal social and economic interests.[163] In the context of the AML, it's author's view that the scope of public interest include effective market competition, economic efficiency and consumers' interest, energy saving, and disaster relief, etc.

There is an overlap between the public interest and consumers' interest which are legislated as two separate objectives of the AML. Inclusion of consumers' interest into the scope of public interest is demonstrated in the Chinese legal system, for example the Civil Procedure Law 2012

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[160] European Commission Report on Competition Policy (2015), Intro. section, available at: http://ec.europa.eu/competition/publications/annual_report/2015/part1_en.pdf, accessed in November 2016.

[161] P. Lowe, 'The Design of Competition Policy Institutions for the 21st century – The Experience of the European Commission and DG Comp' (2008) 3 *Competition Policy Newletter*,1. See also: Sir John Vickers, Chairman, Office of Fair Trading (OFT), opening remarks at the European Competition and Consumer Day Conference, 15 September 2005, cited by H Jenkins, 'Protecting Consumers: Does Competition Help?' (2005)4 *Competition Law*, 283.

[162] Li G.H., 'Research on the Concept of Public Interest in the AML', Chinese Competition Law Network, 2014, available at: http://www.competitionlaw.cn/info/1113/1617.htm, accessed in December, 2017.

[163] Xiaoye Wang, 'Legislative Objectives of the AML', available at: http://www.iolaw.org.cn/showArticle.asp?id=2342, accessed in December 2017.

(the CPL 2012)[164] and the Consumer Protection Law[165]. The consumers collective action is one of categories of collective action relating to public interest provided by the CPL 2012.[166] (Detailed discussion on antitrust collective action in *Chapter 4* of the thesis).

The concept of public interest is too broad and ambiguous to be defined by the legislature in the AML. From the perspective of the application and interpretation of the AML, this has advantages, but also disadvantages. On the advantage side, the broadness of the term has provided a certain degree of flexibility: for example, business operators may apply for exemption of certain anticompetitive agreements for the reasons of public interest, like saving energy, protecting the environment, and disaster relief.[167] That is partly the reason why the legislation on the definition, scope, and role of the public interest are absent in the AML.

However, due to such flexibility, during the drafting process of the AML, a debate arose as to whether the protection of public interest, codified into the AML as a legislative objective, could be a disadvantage because, some commentators were concerned that, given the lack of independence of China's competition authorities, the protection of the public interest would develop into the protection of major undertakings, especially the SOEs.[168] It is conceivable that this could work against consumers' interest. Because some SOEs, which are granted special or exclusive right for certain public interest, such as saving energy, and technology advance, might abuse their special right, to restrain competition, which would lead to low-quality and less choice of goods or service provided to consumers. (The competition issue of the SOEs in China will be further considered in *Chapter 5* of the thesis)

The AML, as part of the "economic constitution" of China, has influenced almost every industry and every aspect of economy in China. The definition of public interest varies among different industries, and changes as the economy develops. This is similar to the EU's understanding of the concept of "services of general economic interest" (SGEI) in EU

[164] The Civil Procedure Law of China, was enacted in 1992, then was amended in 2012. The currently effective version is the CPL 2012. Articles 52-56 provide for collective litigation.
[165] The Consumers Protection Law of China 2013 is the currently effective version.
[166] Article 55 of the CPL 2012; the Judicial Interpretation 2016 of the Supreme People's Court on the Issues Concerning Hearing the Consumer Public Interests Civil Actions.
[167] Article 15(4) of the AML.
[168] Xiaoye Wang, 'Legislative Objectives of the AML', available at: http://www.iolaw.org.cn/showArticle.asp?id=2342, accessed in December 2017.

competition law.[169] Although the EU Commission has issued a number of documents[170] as to SGEI, EU legislation and jurisprudence has never come up with a comprehensive definition of SGEI, because it is a dynamic and evolving concept.[171]

Therefore, consumers' interest and the public interest are listed among the objectives of the AML, and further as the goals of antitrust damages action in China. There exists an overlap in their scope, and sometime conflicts between them, especially considering the grant of special right to the SOEs which are closely related to consumers' interest. A possible solution to this problem is to clarify the relationship between public interest and consumers' interest in a *hierarchical* way, rather than to give a comprehensive definition to these terms, through further judicial interpretation of the SPC, or legislative interpretation of the National People's Congress.

In addition to these statutory goals, there are some implied goals[172] which are inherently required by the Chinese antitrust damages action and could be directly applied to guide the court and litigants of the antitrust damages actions. More importantly, identification of these direct goals could better provide guidance for construction of specific mechanisms of antitrust damages action.

2.2 Other Implied Important Goals

As properly pointed out by the SPC, the 2012 Judicial Interpretation is intended to facilitate antitrust damages litigation through specification of relevant procedural and substantive rules, to support private enforcement, and to foster a competition consciousness among the public and a sound competition environment. Meanwhile, the private enforcement should not lead to over-deterrence and the suppression of procompetitive business activities.[173] On this point, the

[169] SGEI could be applied to grant exemption for certain state-initiated anticompetitive behaviour, as provided by Article 106(2) TFEU.
[170] For example, Communication on Service of General Interest in Europe [2001] OJ C17/4; Communication on Services of General Interest, Including Social Service of General Interest: a New European Commitment' accompanying the Communication on 'A Single Market for 21st Century Europe', COM (2007) 725 final; Communication on 'A Quality Framework for Service of General Interest in Europe', COM (2011) 900 final.
[171] Alison Jones & Brenda Sufrin, *EU Competition Law-----Text, Cases and Materials* (6th edn, OUP 2016) 625.
[172] For example, to ensure full compensation for the harm caused by the AML infringements, and to complement public enforcement in terms of deterrent effect. See next section below.
[173] The Response of IP Tribunal of the SPC to the 2011 Consultation Paper of the Damages Judicial Interpretation, available

overall goal pursued by antitrust damages litigation in China is similar to the balanced antitrust damages mechanism adopted in the EU.

In addition, and similar to the enforcement model of the EU[174], public enforcement in China is intended to be the traditional and primary enforcement method under the AML. Consequently, goals of antitrust damages need to be further clarified to coordinate antitrust damages action and public enforcement, in order to ensure optimal enforcement of the AML.[175]

2.2.1 Compensation ------a direct and primary goal

It is generally accepted that public enforcement of the AML focuses on protection of the public interest, whereas private enforcement via the courts takes place in the context of a dispute between two parties relating to their subjective rights and focuses on private interest.[176] Private enforcers bringing their case before the court are motivated by the possibility of recovering consequential losses from the infringers, or stopping the infringement from continuing. It is further argued that the direct and primary goal of the damages action in the antitrust context is to obtain compensation for the damage caused by anticompetitive infringement.

As provided by the AML, the infringing undertaking shall bear civil liability where they implement anticompetitive conduct and thereby cause harm to others.[177] Since the AML fails to prescribe any form of civil liabilities, the General Principles of Civil Law 2017, Civil Procedure Law 2012, Tort Law 2010 and Contract Law 1999 have to be resorted to for the purpose of establishing the parameters of civil liability.[178]Among a variety of civil liabilities provided by the Civil Law of China 2017[179], "compensation for loss" is recognised as an important type of civil liability, whereby the primary goal of those seeking it, is to obtain full

at: http://www.court.gov.cn/zixun-xiangqing-2578.html, accessed in November 2017.

[174] The EU competition law, sine its starting, has adopted a combined public and private enforcement system. But, for long time, the private enforcement has been in the state of underdevelopment.

[175] The Response of IP Tribunal of the SPC to the 2011 Consultation Paper of the Damages Judicial Interpretation, available at: http://www.court.gov.cn/zixun-xiangqing-2578.html, accessed in November 2017.

[176] Caroline Cauffman & Qian Hao(eds), *Procedural Rights in the Competition Law in the EU and China* (China-EU Law Series 3, Springer 2016) 3.

[177] Article 50 of the AML.

[178] Preamble of the 2012 Judicial Interpretation.

[179] Article 179 of the General Principles of the Civil Law of China 2017 provides the forms of civil liabilities, including cessation of infringement, removal of obstacles, elimination of dangers, return of property, recovery of original condition, repair, replacement, compensation for loss, payment for breach of contract, elimination of negative influence and rehabilitation of reputation and apology.

compensation for their losses caused by the conduct of another party. Under other aforementioned applicable Laws above[180], compensation for loss is also one of the important forms of civil liability: e.g., damages litigation under the Contract Law 1999 and the Tort Law 2010 seeks to compensate claimants arising from breach of contract or tortious behaviour, in other words, to place the victims back in the situation they were in as if the infringement has not occurred.

The right to compensation for antitrust damage is further confirmed by Article 14 of the 2012 Judicial Interpretation, which delegates power to the competent court to award damages to the claimant based on the found facts.[181] As to the criteria for claiming compensation, the competent court has to assess: 1. Whether the plaintiff is a natural person, a legal person, or other organisation; 2. Whether the cause of action establishes a the violation of the AML; and 3.whether the losses were caused by such violation.[182]

It is worth noting that the causes of action include not only unilateral anticompetitive conduct, such as abuse of a dominant position, but also include anticompetitive agreements and anticompetitive articles adopted by industry associations, as typically listed by the 2012 Judicial Interpretation.[183] For example, in an abuse of dominance case where the competitor might be one group of claimants, the incentive of competitor claimants is to obtain compensation for their lost market share, even though the antitrust damages action is expressly aimed to protect market competition rather than specific competitors. Therefore, the direct purpose of introducing damages action is primarily to compensate for the losses caused by the anticompetitive conduct, rather than such public goals as market competition and public interest, which the private enforcer would not directly pursue. (The scope and quantification of compensation for the losses will be further discussed in *chapter 3*.)

[180] For example, Article 107 of the Contract Law 1999; Article 15 of the Tort Law 2010.
[181] Article 14 of the 2012 Judicial Interpretation provides that where a defendant engages in monopoly conduct and thereby causes losses to a claimant, the court may decide and order the defendant to bear civil liabilities, such as ceasing of infringement, award of damages, based on the plaintiff's claims and found facts in accordance with the law.
[182] Article 1 of the 2012 Judicial Interpretation.
[183] Ibid.

2.2.2 Complement to Public Enforcement

Following the EU competition law public/private enforcement model, the AML adopts a dual-track enforcement system, under which the traditional public enforcement still takes primary position, and private enforcement plays a complimentary secondary role in the antitrust enforcement system. Prior to the AML, the competition policy of central government was purely enforced by administrative authorities: individuals seeking to challenge monopoly conduct had to resort to other laws, for example, the Contract Law. Therefore, before the AML, public enforcement was the "pure" enforcement mechanism for competition law in China.

As observed by some scholars[184], the previous experience of public-oriented enforcement in some jurisdictions, such as the EU[185], has demonstrated significant inefficiency: this has been generally observed in such aspects as the shortage of resources for sufficient investigation[186]; the difficulty in accessing some types of evidence which is easier for private individual to obtain[187]; and the bias of public enforcer in the situation of compromise with certain agency interests.[188]

As for China, one could observe that public enforcement is even more inefficient, because there does not exist an independent enforcement authority, like the EU Commission, which acts free of political interference, instead, there are three agencies, namely the SAIC, NDRC and MOFCOM[189], all tasked with jointly enforcing the AML. They divide their power according to whether the infringement is price-related, or not.[190] This has to some extent brought about

[184] Hedvig K.S.Schmidt, 'Private Enforcement ---- Is Article 82 EC Special', in in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* MPI Studies on Intellectual Property, Competition and Tax Law Vol. 5, Springer 2008, 137-163; also see Giudici, 'Private Antitrust Law Enforcement in Italy', (2004) 1 Competition Law Review, 65.

[185] In the EU, although the enforcement of competition law has relied on both public and private enforcement, the private enforcement has played a complementary role and been underdeveloped since its beginning.

[186] With the increasing diversity of anticompetitive behaviour, the competition enforcement authorities has become short of human and financial resource to uncover and investigate all breaches.

[187] Compared with public enforcers, private claimants have more incentives, better information to combat with some anticompetitive behaviour, especially the breaches directly harming consumers. Also see Kai Hüschelrath & Sebastian Peyer, 'Public and Private Enforcement of Competition Law - A Differentiated Approach', ZEW Centre for European Economic Research Discussion Paper No. 29, April 2013.

[188] This usually occurs in the situation of the multi-agency jointly enforcing competition law, where the agencies have not completely independent authority. The three weakness has also been summarized by Giudici, 'Private Antitrust Law Enforcement in Italy', (2004) 1 Competition Law Review, 65.

[189] See f.n.37.

[190] MOFCOM is in charge of merger control. NDRC has jurisdiction over price-related anticompetitive behaviour, and SAIC is in charge of detecting and investigating non-price-related anticompetitive behaviour, such as non-price abuse of

chaos to the enforcement of the AML, because, first, the price-related criteria often cause an overlap of the agencies' competence, e.g., an infringement may include price-related and non-price-related activities, hence NDRC and SAIC may become intended, leading to inter agency rivalling, conflict, and confusion; second, these three agencies have their own procedural rules as to their own enforcing activities, such as relating to the imposition of fines.[191] Therefore, their procedural rules concerning the AML enforcement need to be further harmonised by their superior agency, for example, the State Council has been attempting to coordinate their rules regarding determination of the amount of illegal profits and fines.[192]

In addition, the public enforcement mechanism against administrative monopoly[193], as set out by Article 51 of the AML[194], has proved ineffective, because it heavily relies on the superior agency's inside investigation and sanction, and the three AML enforcement agencies have no enforcing authority over administrative monopoly.[195] Even the Competition Review System[196], launched especially to eliminate administrative monopoly, by the State Council in 2016, failed to grant direct enforcement authority to the three AML enforcement agencies, instead, the superior government agencies have authorities to conduct ex-ante/ex-post review[197] of administrative documents issued by their inferior agencies, in terms of abuse of administrative

dominant position, non-price administrative monopoly.

[191] NDRC applies the Regulations on Administrative Penalties Regarding Price-Related Infringements as amended in 2010. MOFCOM follows the Commerce Administrative Penalty Procedure Regulation issued in 2012. SAIC adopts the Procedural Rules concerning the Imposition of Administrative Penalties by Industry and Commerce Administrative Authorities 2007. Also see Caroline Cauffman & Qian Hao(eds), *Procedural Rights in the Competition Law in the EU and China* (China-EU Law Series 3, Springer 2016) 3.

[192] A Consultation Paper concerning determination of illegal profits and the amount of fines in relation to anticompetitive behaviour, was published by the State Council in 2016, in order to coordinate the enforcement agencies' rules as to fines. The text of the Consultation Paper is available at: http://www.ndrc.gov.cn/yjzq/yjfk/t20160617_807549/201607/t20160728_812966.html,(in Chinese), accessed in November 2017.

[193] Administrative monopoly refers to the anticompetitive behaviour conducted by government agencies through abusing their administrative authorities, which is specifically referred to a series of behaviour prohibited by Chapter 5 of the AML, for example, abusing administrative authorities to adopt some protectionist or discriminatory regulations, so as to restrict competition.

[194] Article 51 of the AML provides that the superior agency of the offending agency has authority to sanction administrative monopoly conduct by ordering the offending agency to stop the conduct.

[195] For more detailed consideration of China's public enforcement against administrative monopoly, please see Section 2.2 of Chapter 5.

[196] Under the State Council's inside order to establish a Competition Review System, a Temporary Implementing Rules on Competition Review System was jointly issued in 2017 by the NDRC, SAIC, MOFCOM as well as another two departments of the State Council, to provide guidance for lower government agencies to review their inferior agencies' administrative documents, as to whether there is anticompetitive effect. The official text of the Rules is available at: http://www.gov.cn/xinwen/201710/5234731/files/d78cf6b8b2d64bf0b4793bf334a04959.pdf (in Chinese), accessed in November 2017.

[197] Ex-ante review occurs before an administrative document is issued and becomes effective. Ex-post review occurs after an administrative document has come into effect.

authority to restrain competition.

Therefore, the public-oriented enforcement mechanism is still far from the optimal level of enforcement pursued by the AML. The fact that the three agencies, namely, the NDRC, SAIC, and MOFCOM, share the enforcement authority of the AML, has caused several power struggles among these agencies, the divided jurisdiction over one anticompetitive behaviour, and sometimes the overlap in the jurisdiction. In addition, the current public enforcement against administrative monopoly has caused the three agencies' limited jurisdiction over administrative anticompetitive behaviour. (The deficient public enforcement against administrative monopoly in China will be further discussed in *Chapter 5* of the thesis). Private enforcement could make up for the weakness of such under-enforcement, through private enforcers' instituting private damages action against the administrative monopoly which have not been caught by the public authorities.

3. The Antitrust Damages in the EU-----Full Compensation established as the primary objective

3.1 The Substantive Basis of EU Antitrust Damages Actions: Article 101, 102 and 106 TFEU

In order to bring an antitrust damages action before the court, generally speaking, the following criteria have to be satisfied: 1. Occurrence of an infringement; 2. Harm to an individual person or entity; 3. Existence of a causal relationship between the infringement and the harm. At the national level, what anticompetitive behaviour can be the cause of damages action is provided by national competition laws.[198] At the EU level, the competition rules mainly include Articles

[198] For example, in the UK, the Competition Act 1998 prohibits anticompetitive agreements and cartels, abuse of dominance.

101[199] and 102 TFEU[200], as well as Article 106 TFEU[201] which serves as a supplement to Articles 101 and 102, in terms of public undertakings and undertakings with special or exclusive rights.

The direct application of these EU competition rules in the national courts has been confirmed by Council Regulation 1/2003[202], which is a decentralization strategy of the enforcement of EU competition law, triggered by the EU competition modernisation process.[203] Under Regulation 1/2003, the national courts of Member States share the enforcement and application of EU

[199] Article 101TFEU provides as follows:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

---any agreement or category of agreements between undertakings;
---any decision or category of decisions by associations of undertakings;
---any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensible to the attainment of these objectives;

afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[200] Article 102 TFEU provides that:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member states. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[201] Article 106 TFEU provides that:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[202] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

[203] Ioannis Lianos, Peter Davis & Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition law* (OUP 2015) 15.

competition law. The decentralized application of EU competition law has formed the parameters of the current enforcement system, under which the public enforcement plays a central role, and private enforcement plays a complementary role: the direct application of EU competition law in the national courts means that individuals can directly bring litigation before national courts, arising from the infringements provided by Article 101, 102 and 106 TFEU, because these provisions produce rights and obligations for individuals, on which the national courts have to protect and enforce.[204]

These prohibitions at the EU level, which could be litigated by individuals before national courts, generally include: anticompetitive agreements between undertakings, horizontally or vertically, such as price-fixing, market-sharing and bid rigging behaviour[205]; abuse of dominant position of undertakings in the relevant market[206], such as price squeezing[207], predatory pricing[208], and certain rebate schemes[209]; and the state-initiated anticompetitive behaviour, specifically, Article 101 or 102 infringements committed by public undertakings and the undertakings granted with special or exclusive right by a State.[210]

Similarly, the AML also provides these categories of the anticompetitive behaviour, which are restrictive agreements, abuse of dominant position, merger control[211] and administrative monopoly.[212] As to private enforcement against these prohibitions under the AML, Article 50[213] serves as the legal basis of the right of private individuals to damages, though it is quite

[204] Directive 2014/104, OJ L 349/1, para. (3).
[205] Article 101(1) TFEU.
[206] Article 102 TFEU.
[207] Price squeezing refers to the situation in which a dominant undertaking actively operating on more than one production level, overprices the product in the middle of production chain, in order to undermine its competitors at the end-product market. The example could be found in the cases, such as, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB,* [2011] 4 C.M.L.R. 18; [2012] All E.R. (EC) 1092.
[208] Predatory pricing occurs where an undertaking in dominant position, in order to foreclose existing or potential competitors, sells it products or service at a price below cost, or puts itself in the loss situation on purpose. This behaviour could be found in the cases, for example, Case C-62/86, *AKZO Chemie BV v Commission of the European Communities,* [1991] E.C.R. I-3359.
[209] The anticompetitive rebate scheme occurs when an undertaking with dominant position offers a discount on the condition of the customer must accept all or some of its requirements, to limit the buyers' freedom. The example is the recent controversial Intel case in which the EU Commission found the rebate program of Intel is abuse of dominant position, but the Court of Justice annulled the Commission's decision, and held that an exclusivity rebate cannot be simply decided as abuse of dominant position, and it should be subject to effect-based analysis.
[210] Article 106(1) TFEU.
[211] Article 3 of the AML.
[212] Chapter 5 of the AML.
[213] Article 50 of the AML.

general and needs further implementing rules.[214]

It is worth noting that EU law provides exemption to some of these anticompetitive behaviour: as for the anticompetitive agreements and concerted practice between undertakings, the exemption could be granted based on such grounds, as: improving the production or distribution of goods; promoting technical or progress; and improving consumer welfare. To gain exemption, restrictions on competition must be *indispensable* to the achievement of these aims, and not affect a substantial part of the products in question.[215]

Exception could also be granted to the State-initiated anticompetitive behaviour of public undertakings or undertakings with special or exclusive rights, provided that these undertakings are entrusted by the State with certain tasks, (such as the revenue-producing monopolies and the Services of General Economic Interest (SGEI)), and where the application of the competition law would obstruct the performance of these tasks.[216] (The application of Article 106 TFEU in this regard will be examined in-detail in *Chapter 5* of the thesis.)

Equivalently, it is assumed that Article 7 of the AML provides powerful exemption to such State-initiated anticompetitive behaviour.[217] Under Article 7, with respect to the key industries, such as, relating to national security, or lifeline of national economy, the State shall control their business operation, and the prices of the goods and services provided by these businesses.[218] The major difference from Article 106 TFEU lies in the distinct grounds of exemption, which are respectively the SGEI in Article 106, and some broadly-defined terms in Article 7, such as "lifeline of national economy", "national security" and "technology advance".[219] Despite this difference, the EU's approach to grant exemption to State monopoly is worth referring to when improving litigation system against administrative monopoly in China. (Article 7 of the AML will be further discussed in *Chapter 5* of the thesis.)

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[214] For more discussion on Article 50 of the AML and its Judicial Interpretation 2012, please see: Section 2 of Introduction Chapter, Chapter 3, Chapter 4 and Chapter 5.
[215] Article 101(3) TFEU.
[216] Article 106(2) TFEU.
[217] Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics Research Paper Series Working Paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.
[218] Article 7 of the AML.
[219] Article 7 of the AML.

As far as the direct effect of EU competition rules at the national level is concerned, Regulation 1/2003 has enabled the national courts to apply these exemptions to the behaviour which are otherwise incompatible with Article 101, 102 and 106 TFEU.[220] Therefore, Article 101,102 and 106 TFEU are directly applicable in the national courts. This ensures that individuals harmed by either public or private infringements may bring litigation before a national court to claim damages for their losses resulting from the infringements. More importantly, as to the application of the EU competition rules, the national courts may, under Article 267, make references to the Court of Justice of European Union (the CJEU) for preliminary ruling regarding the interpretation of the legal issues in question.[221] A large amount of case laws from the CJEU has proved the Article 267 route a significant contribution to the development of antitrust damages action in the EU, in particular to the question of establishment of full compensation for antitrust cases.

3.2 Right to damages -------Leading EU Cases

Before the EU Commission's first serious attempt[222] to coordinate antitrust damages system at the EU level, the CJEU has already made significant contribution to lay down the foundation for the damages mechanism against the infringements of Article 101, 102. The individual right to antitrust damages was firstly established in the EU through the CJEU case law[223], based on the direct effect of EU competition rules at the national level. Furthermore, full compensation has been gradually recognised as a principle governing the antitrust damages litigation, and the basic elements of full compensation principle have been clarified by the CJEU, for example, the scope of damages including *actual loss, loss of profits and payment of interest.* In China, although the scope of damages remedy is basically defined by the Tort Law and the Contract Law[224], the scale of antitrust damages remains unclear under the AML and its Judicial Interpretation 2012.[225] Therefore, the interpretative jurisprudence of the CJEU regarding the

[220] Regulation 2003/1, also see Alison Jones & Brenda Sufrin, *EU Competition Law-----Text, Cases and Materials* (6th edn, OUP 2016) 125
[221] Article 267 TFEU.
[222] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2005) 672 final.
[223] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.
[224] The scope of damages under the Contract Law and the Tort Law of China will be further discussed in section 2.1 of Chapter 3.
[225] The Judicial Interpretation on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases

elements of antitrust damages could contribute some constructive ideas to the proper calculation of antitrust damages in China. (Further discussion on quantification of antitrust damages will be in *Chapter 3* of the thesis.)

3.2.1 *Courage v. Crehan*[226]

Crehan case is a landmark case in the shaping of the antitrust damages mechanism of the EU.[227] The case was concerned with a standard form of leasing agreement concluded between a brewery, Courage (later the IEL, the company after merger between Courage and the Grand Metropolitan plc to whom the pubs were transferred), and a pub tenant, Mr. Crehan. The agreement contained an exclusive purchasing obligation for a fixed minimum quantity of specified beers at the prices shown in the brewer's price list. Before UK court, Courage brought an action for the recovery from Mr Crehan of unpaid supplies of beer (the sum of more that £15,000). Mr Crehan counterclaimed that the exclusive purchase clause in the agreement was contrary to Article 101 TFEU and further that he deserved the damages from Courage for their impositions on him of anticompetitive clause.[228] The English Court of Appeal referred four questions[229] to the CJEU for preliminary ruling.

In this case, the CJEU, for the first time, got an opportunity to address the existence of a right to damages resulting from anticompetitive behaviour. The Court confirmed that Article 101 produces direct effects in relations between individuals, and directly creates rights in respect of the individuals concerned, which the national courts must safeguard. The Court further held that any individuals, even the parties to an anticompetitive agreement, can rely on Article 101

Arising from Monopoly Conduct was issued by the SPC in 2012.

[226] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.

[227] Ariel Ezrachi, 'From Courage v. Crehan to the White Paper---- the Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation', in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, (*MPI Studies on Intellectual Property, Competition and Tax Law Vol. 5, Springer 2008) 117-135.

[228] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297, para.1-11.

[229] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297, para.16. The four questions referred to the Court are: "1. Is Article 81 E.C. to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that Article to seek relief from the courts from the other contracting party? 2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81? 3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law? 4. If the answer to Question 3 is that in some circumstances such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?".

in order to seek damages before national courts.[230] Even the co-contractor who bears significant responsibility for the anticompetitive effect still have a right to damages, subject to the assessment as to all relevant facts and evidence presented before the national court.[231]

The Court further invoked the principle of full effectiveness of the Treaty, taking the view that the practical effect of the prohibition laid down in Article 101 would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. It is worth pointing out that 'as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case law, "the national courts whose task is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals".[232] It further stated that "the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".[233]

Following the CJEU Article 267 ruling in *Crehan*, the case was returned to the English High Court for full trial and was heard in 2003. In the High Court judgment, the Judge acknowledged that the normal rule under English law is that damages are assessed at the date of loss, not at the date of judgment, however, this is not an invariable rule of law, if the justice of that case requires damages to be measured at the date of judgment the court may award damages on that basis instead. In this case, the Judge believed that if the damages were measured at the date of loss plus interest, it would not be adequate compensation. Therefore, the measure of damages should be ascertained at the time of judgment, not at the date when Mr Crehan had to give up the agreements for lease of his two pubs.[234] Both the interest rate and the time point since when the interest is calculated affected the level of compensation.

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[230] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297, para.24.
[231] Ibid, para.59.
[232] Ibid, para.25.
[233] Ibid, para.26.
[234] *Bernard Crehan v. Inntrepreneur Pub Company and another* CH [1998] C801, English High Court, [2004] EWCA Civ 637, para.267-268.

The judgment in this case reflects the position that the calculation of damages should be based on the compensatory principle that the loss of victims must be *fully compensated* by the award of damages in the antitrust damages claim.

Consequently, the *Crehan* judgment is in essence of far-reaching significance since in this case the CJEU established the right to antitrust damages *as a matter of the EU law*. The ruling has sent out a clear message that whatever the position of national law, there must, in principle, be a right to damages for breaches of both Articles 101 and 102 TFEU. It is of significance to all damages claims, not just those involving co-contractors. Therefore, it is submitted that the rationale behind the right to damages, as established by the ruling of *Crehan*, is the *full compensation* for the losses caused by the breaches.

Comparatively, the AML provides legal basis for antitrust damages action in a straightforward way, which is through very general but definitive language of Article 50 AML. Although Article 50 and its Judicial Interpretation 2010 fail to explicitly stress "full compensation" for the losses caused by the AML breaches, any natural or legal persons, and organisations who are harmed by anticompetitive behaviour are granted with right to damages by bringing civil litigation before the competent court.[235] This has the same effect of confirming the legal standing of some uncertain victims, like indirect purchasers, party to the contract with anticompetitive effect, as the CJEU's emphasis of the right of "any individual" to claim damages for losses.[236]

3.2.2 *Manfredi*[237]

The *Manfredi* case was initiated in Italy by some consumers against several insurance companies for their anti-competitive agreement leading to the overcharge of the premiums.[238]

In this case, the CJEU reconfirmed the compensatory principle enunciated in *Crehan*[239], stating that any individual can claim compensation, if there is a causal relationship between the

[235] Articles1 and 3 of the Judicial Interpretation 2012.
[236] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297, para.24.
[237] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619.
[238] Ibid, H2.
[239] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297.

infringement and the individual harm.[240] The Court further held that, in the context of Article 101 infringement, 'any individuals' include not only the parties to the agreement, but also the third parties----the consumers in this case.[241] This judgment has laid a foundation for the collective redress proposed by the Commission for consumers' mass harm claims.

As to the calculation of damages, the Court clarified three essential components of an antitrust damages award: it should include actual loss, loss of profit, and payment of interest.[242]

On the calculation of damages, the Court further stated that:

"*total exclusion of loss of profit as a head of damages for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible*".[243]

With respect to the payment of interest, the CJEU in *Marshall v. Southampton and others*[244] held that full compensation for the loss and damages sustained as a result of discriminatory dismissal cannot leave out of account factors which may in fact reduce its value, hence the award of interest must be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.[245]

It is worth noting that, in *Manfredi*, the Court did not exclude the possibility of punitive damages, stating that it is for the national laws to set criteria for the determination of punitive damages, which must be in compliance with the principles of equivalence and effectiveness.[246] The Court added that the award of punitive damages should not lead to the unjust enrichment of claimants.[247]

Therefore, the ruling of the Court in *Manfredi* has further developed the principle of full

[240] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619, para.61.
[241] Ibid, para.55-58.
[242] Ibid, para.95-97.
[243] Ibid, para.96.
[244] Case C-271/91 *M Helen Marshall v. Southampton and others* [1993], ECR I-4367.
[245] Ibid, para.31.
[246] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619, para.92.
[247] Ibid, para.99.

compensation. It recognized the right to damages of both direct and indirect purchasers, which is an elaboration of the reference to "any individual" referred to in *Crehan* case.[248] Meanwhile, in order to fully compensate for the harm, the basic scope of the damages has been defined by the Court to include *actual loss, loss of profits and payment of interest*. Although it is arguable that these three heads may not sufficient to cover all the damage in some scenarios, such as, loss of opportunity cost, the scope given by the Court has provided a firm guidance to the national courts to calculate antitrust damages based on the full compensation purpose.

It is also noted that *Manfredi* case was decided just after the 2005 Green Paper[249] was published. There is no doubt that the ruling of the CJEU has echoed the position of "effective remedy" adopted by the Commission.[250] Particularly, the open attitude of the CJEU on punitive damages, was in line with the Commission's stress on deterrence as one of the outcomes of the antitrust damages action, though the Commission's attitude on the deterrence effect has changed in its White Paper[251] in 2008.

The three basic heads of damages clarified by *Manfredi* ruling could provide guidance for the Chinese court to properly calculate antitrust damages, in order to achieve full compensation, which is the actively-pursued goal of the private enforcers in China. As to the availability of punitive damages in antitrust litigation of China, it largely depends on the level of deterrent effect to be contributed by the private litigation, as well as the deterrence already achieved by existing public enforcement. (The deterrent effect of the damages action is further discussed in *Section 4* of this chapter.)

3.3 Full Compensation at the Regulatory Level -----From Green Paper 2005 to Directive 2014/104

The EU Commission's effort to enhance private enforcement of competition law was mainly

[248] Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297, para.24.
[249] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final.
[250] Eddy De Smijter & Denis O' Sullivan, 'The Manfredi Judgment of the ECJ and How It Relates to the Commission's Initiative on EC Antitrust Damages Actions', Competition Policy Newsletter, No.3, Autumn 2006, also available at: http://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf, accessed in January 2016.
[251] Commission White Paper of on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final.

triggered by the decentralization process of the implementation of EU competition law, which was introduced by Regulation 1/2003[252], stressing the role of national competition authorities and courts in the enforcement of EU competition rules. In addition, in *Crehan*, the CJEU's recognition of the right to damages granted by the Community law, which should be directly enforced by national courts, was also a driving force of the Commission to enhance the antitrust damages action at the EU level. However, both the Regulation 1/2003 and the case law of the CJEU failed to provide any procedural rules for the antitrust damages actions.

The Commission's endeavour to enhance antitrust damages actions started from 2005, in which a Green Paper[253] and a staff working paper[254] on damages was published. Following the Green Paper 2005, the Commission published a White Paper[255] and a staff working paper[256] in 2008 to further strengthen antitrust damages action in the Union. Based on the years' efforts, the Commission finally adopted a Proposal[257] governing the antitrust damages action in 2013, which became Directive 2014/104 /EU.[258]

3.3.1 The Green Paper 2005

The Green Paper 2005 posed the problem of underdevelopment of the private enforcement of competition law in the EU Member States.[259] In order to establish an effective antitrust damages system, the Commission identified the major obstacles to the effective damages system, such as access to evidence, the definition and quantification of damages, and availability of collective action. Optional solutions to each issue were proposed to improve the situation in the context of antitrust damages action.

As proposed in the Green Paper 2005, goals of the antitrust damages action are: firstly, to

[252] Council Regulation (EC) No. 1/2003, OJ L 1/1.
[253] The Green Paper 2005, COM (2005) 672 final.
[254] Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust rules, SEC (2005) 1732.
[255] The White Paper 2008, COM (2008) 165 final.
[256] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404.
[257] Commission Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, COM (2013) 404 final.
[258] Directive 2014/104, OJ L 349/1.
[259] The Green Paper 2005, para.1.2.

compensate the individual losses caused by anticompetitive behaviour; and secondly, to deter anticompetitive behaviour so as to maintain the full effectiveness of EU competition law. Accordingly, both *compensation and deterrence* were equally set as the goals of damages action.[260] This was especially demonstrated by the national court's discretion over the award of punitive damages with regard to horizontal cartels.[261]

3.3.2 The White Paper 2008

In 2008, a White Paper was published by the Commission, seeking to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of EU competition law. The primary objective of private enforcement was to ensure that all victims of infringements of EU competition law can be fully compensated for the harm they have suffered. Furthermore, full compensation was confirmed as a leading principle in the antitrust damages action. Full compensation is, therefore, the first and foremost guiding principle. [262]

As for deterrence, which was proposed to be a goal of the antitrust damages action in the Green Paper 2005, the White Paper only mentioned it as a side effect, inherently produced by the compensatory antitrust damages system.[263] So the White Paper 2008 seemed to give more priority to compensation as the primary goal as compared to deterrence.

The compensatory principle governs all the proposals put forward in the White Paper. In particular, as regards standing, it states that any individual who has suffered harm, whether a direct purchaser or indirect purchaser, shall have a legal standing to bring an action where there is a causal link between the harm and an infringement of article 101 and 102 TFEU. In terms of access to evidence, the Commission proposed that Member States must apply all domestic rules and principles on the facilitation of bringing evidence available in order to ensure that victims of antitrust infringements can exercise their right to compensation effectively. In relation to the calculation of damages, it is proposed that the "full compensation" means

[260] Commission Staff Working Paper Annex to the Green Paper 2005, COM (2005) 672 final, para.4,5,6.
[261] The Green Paper 2005, COM (2005) 672 final, para. 2.3.
[262] The White Paper 2008, COM (2008) 165 final, sec.1.2.
[263] Ibid.

compensation *for actual loss and loss of profit, plus interests from the time the damages occurred until the capital sum awarded is actually paid*.[264]

From the proposition on full compensation as set out in the White Paper, we can see that the principle of full compensation includes two key elements. Firstly, all victims, including direct purchasers and indirect purchasers, have the right to claim damages arising from breaches of EU antitrust rules. In particular, the standing of indirect purchasers ensures that the compensatory principle covers any victims. According to Green Paper 2005, not only competitors, direct purchasers, but also indirect purchasers, including retailers, end users of a product, and final consumers, should be able to bring a damages action.[265] Furthermore, collective redress with respect to the antitrust damages action, proposed by the Commission, facilitates consumers (who are indirect purchasers in most cases) to bring damages claims. This measure makes the compensation more efficient where the number of victims is large, and in particular, the value of individual loss is too low to incentivise the individual victim to bring claims, since individual customers and small businesses may be dissuaded from starting a case given the costs, delays, uncertainties and burdens involved, compared to the value of their individual claim.[266]

Secondly, full compensation also means that infringers of antitrust rules compensate the victims for all the losses, including actual loss, loss of profit and interests. Although Community law was silent on the calculation of antitrust damages, proposals of the Commission provide clear guidance for national legal institutions of the Member States. The *principle of full compensation* implies that the Member States may not a *priori* fix any form of upper limit on the amount of compensation that the victim of an antitrust law infringement could effectively recover.

3.3.3 Directive 2014/104

In 2014, a Directive on antitrust damages actions was adopted by the EU, with the aim of

[264] In the Commission Staff Working Paper accompanying the White Paper 2008, COM (2008) 165 final, the Commission provides a general overview of its interpretation of the relevant *acquis communautaire* governing damages claims.
[265] The Green Paper 2005, COM (2005) 672 final, s.2.4.
[266] Ivo Van Bael, *Due Process in EU Competition Proceedings*, (1st edn, Wolters Kluwer Law & Business 2011) 398.

ensuring the smooth interaction between public and private enforcement of EU competition law on the one hand, and the effective exercise of the right to full compensation on the other hand.[267] The right to full compensation has been clarified in Article 3, which states that:

1. *Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.*

2. *Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.*

3. *Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.*[268]

Clearly, in terms of the objective of the antitrust damages action, Directive 2014 is in line with the approach set out in the White Paper 2008, as it has consistently taken the compensatory approach, rather than deterrent approach, to facilitating private enforcement.

As to the scope of antitrust damages, the Directive 2014 adopts the recovery principle, and stresses three necessary heads of damages, including *the actual losses, loss of profit, and the payment of interest*. It is argued that these are only basic elements of antitrust damages. Although the Directive 2014 does not provide for the award of multiple and punitive damages, only stating that damages must not lead to overcompensation, it could be inferred that the Directive 2014 has left this issue to national rules to lay down proper provisions on punitive damages. This is also compatible with the CJEU ruling in *Manfredi*[269], which did not absolutely rule out particular damages, like multiple or punitive damages. Thus, the States may adopt punitive damages in the antitrust damages litigation as long as such damages are also available for similar actions under national laws. For example, in the UK, the punitive damages have

[267] The EU Commission 2013 Proposal for a Directive on antitrust damages action, sec.1.2.
[268] Article 3 of the Directive 2014/104, OJ L 349/1
[269] Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619, para.99.

been ever awarded in *Cardiff Bus*.[270]

As to the deterrence, although the Directive does not set it as a goal of the antitrust damages action, the 2013 Proposal recognized that the risk of paying damages to victims would be an incentive for infringers to better comply with competition law. This means that private litigations would contribute to produce deterrence and compliance.[271](For more discussion on deterrent effect of antitrust damages action, please see the following section: *Section 4* of this chapter). But under the Directive 2014, the primary goal of damages action is to judicially protect harmed individuals and compensate for their harm caused by anticompetitive infringements.[272]

The attitude of the CJEU also reflects the change with regard to the deterrence. In *Kone* case[273], the CJEU delivered its judgment just after the adoption of the Directive 2014. When it comes to the *effectiveness* of competition law, the Court referred to the right of any individual to claim compensation for loss, rather than to the effective competition. Therefore, it seems that in tracking a balance between compensation and deterrence, the Court has given more priority to individual's right of compensation.

In China, as discussed in *Section 2* of this chapter, full compensation is an implied goal of the antitrust damages action. With regard to basic elements of antitrust damages, the principle of full compensation provided by Directive 2014 could serve as a guidance to define the scope of antitrust damages for Chinese courts. But as to another important aspect of full compensation, that is, the compensation in the mass harm situation, Directive 2014 make little contribution because it keeps silent on collective redress mechanism at the EU level. (More discussion on antitrust collective action in the EU and China will be in *Chapter 4* of the thesis).

On the availability of punitive or multiple damages, Directive 2014 imposes no strict ban on it, only requiring that over-compensation would not be led.[274] This position is quite similar to the

[270] *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd*, [2012] CAT 19.
[271] Reindl A., 'The European Commission's Package on Private Enforcement in Competition Cases: Introduction to a CPI Antitrust Chronicle', *CPI Antitrust Chronicle*, August 2013,3.
[272] Nebbia P.,'Damages Action for the Infringement of EC Competition Law: Competition or Deterrence?' (2008) 33 E.L.Rev, 23, 35-36.
[273] Case C-557/12 *Kone, Otis, Schindler and Others v. OBB Infrastruktur AG*, EU:C:2014:1317.
[274] Directive 2014/104, OJ L 349/1, para. (13).

attitude of the SPC of China, that is, the antitrust compensation would not result in over-deterrence which occurs where the damages award is much higher than the illegal gains of defendants, so as to supress some pro-competitive business activities.[275] The multiple or punitive damages, as effective means of increasing deterrence, may lead to over-compensation and over-deterrence. Therefore, it is assumed that the SPC of China also takes a cautious attitude towards punitive or multiple damages in the antitrust litigation.

4. Deterrence----- a side effect or a goal of the antitrust damages action?

With respect to the enforcement of competition law, public and private enforcers have divergent purposes. Public enforcers aim to deter anticompetitive behaviour so as to protect market competition, while private enforcers are incentivised by the prospect of obtaining compensation for the individual harm brought about by anticompetitive behaviour. More importantly, when claiming damages, private enforcers only need to prove their individual harm, rather than the harm to market competition. Accordingly, in a dual-track enforcement system, like the EU and China, where deterrence is the primary goal pursued by public enforcers, setting deterrence as the goal of private enforcement also would lead to *over-deterrence*. Because, in theory, if the purpose of the damages action is to deter the defendant from breaching competition law, the calculation of damages would necessarily focus on the assessment of illegal profits of the defendant, and also the intent of defendant needs to be assessed by the court. This would lead to over-deterrence, in addition to the deterrence already pursued by public enforcers.

In China, although the public enforcement of the AML is often criticised for the chaos caused by the rivalling and conflicts of three enforcement agencies, namely the SAIC, NDRC, and MOFCOM, the State Council has made effort to coordinate the implementing behaviour of

[275] The Response of IP Tribunal of the SPC to the 2011 Consultation Paper of the Antitrust Damages Judicial Interpretation, available at: http://www.court.gov.cn/zixun-xiangqing-2578.html, accessed in November 2017.

these agencies.[276] Therefore, the tendency is that the deterrent effect of the AML public enforcement is being enhanced by increasing coordination and improvement of implementing behaviour of three agencies. Due to the concern of over-deterrence, therefore, deterrence should not be set as a goal actively pursued by antitrust damages action in China.

Actually, the amount of antitrust damages calculated under the compensatory principle is observed to be likely to exceed the illegal profit of defendant. In this case, the award of damages could be regarded as having significant deterrent effect on the infringement.[277] However, the opposite view has been taken that the antitrust damages action makes very few contribution to deterrence[278], especially in stand-alone cases[279]: from an economic perspective, there exists a time gap between the commencement of anticompetitive behaviour and the delivery of the court's judgment, during which time the high managerial turnover rates occur in a mature market economy and business world, leading to ineffective deterrence.[280]

Some even argue that there is no need for complementary private enforcement to provide additional deterrence.[281] This may well be true in a perfect public enforcement system where the competition authorities initiate an optimal number of proceedings in all types of cases and impose optimal sanctions. But the reality of existing public enforcement of the AML is still far from an optimal enforcement against anticompetitive behaviour in China. The deterrent effect contributed by antitrust damages could therefore serve a complementary role to the current

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[276] For example, in order to coordinate enforcement agencies' rules as to fines, a Consultation Paper concerning determination of illegal profits and the amount of fines in relation to anticompetitive behaviour was published by the State Council in 2016. The text of the Consultation Paper is available at: http://www.ndrc.gov.cn/yjzq/yjfk/t20160617_807549/201607/t20160728_812966.html, (in Chinese), accessed in November 2017.

[277] Ioannis Lianos, Peter Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 228.

[278] Because companies' managers, as the decisionmaker of competition strategy, usually serve shorter period, compared to the length of antitrust damages proceedings, this has greatly limited the deterrent effect of antitrust damages on company managers. See Crane D.A., 'Optimizing Private Antitrust Enforcement', (2010) 63 Vanderbilt Law Review, 675-723; the similar view is also taken by Mark-Oliver Mackenrodt, 'Private Incentive, Optimal Deterrence and Damage Claims for Abuse of Dominant Positions---The Interaction between the Economic Review of the Prohibition of Abuse of Dominant Positions and Private Enforcement', in Mark-Oliver Mackenrodt, et al.(eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* MPI Studies on Intellectual Property, Competition and Tax Law Vol. 5, (Springer 2008) 165-189.

[279] Stand-alone cases refer to the situation where the claimant bring damages claim before enforcement authorities make infringement decision as to an anticompetitive behaviour.

[280] Crane D.A., 'Optimizing Private Antitrust Enforcement', (2010) 63 Vanderbilt Law Review, 675-723.

[281] It is argued that the Commission aimed to reduce its workload by leaving purely legal issues to national courts, but as for the complicated economic and politic involved competition issue, the Commission has the last word. See Roger J. Van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edition, Thomson Sweet & Maxwell 2006) 158.

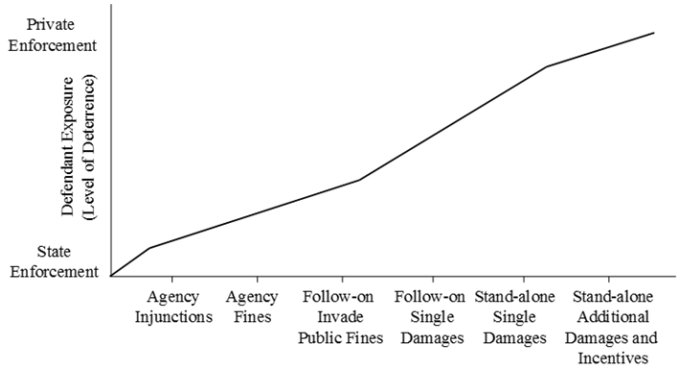
public enforcement of the AML.

Therefore, based on above arguments, deterrence should not be a goal actively pursued by the antitrust damages action. But there is no doubt that the antitrust damages action might have deterrent effect on potential infringements by awarding damages higher than potential gains from anticompetitive behaviour. Because the optimal deterrence is expected to be achieved by effective public enforcement, in the situation of ineffective public enforcement where deterrence is insufficient to prevent infringements, private enforcement could contribute a certain deterring measure as a compliment to public enforcement. Due to uncertainty and inconsistence of the deterrent effect produced by the antitrust damages action, the question has arisen as to what is the proper level of deterrence that the damages action should contribute to total optimal deterrence.

A proper level of deterrent effect of the antitrust damages action depends on a balanced litigation mechanism which not only facilitates the initiation of litigation before courts, but also which prevents unmeritorious litigation and over-deterrence.[282] As to what the proper level of deterrence is, the following graph developed by Foer & Cuneo could illustrate the role of private damages in achieving optimal deterrence.

[282] Ariel Ezrachi, 'From Courage v. Crehan to the White Paper---- the Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation', in Mark-Oliver Mackenrodt, et al. (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?,* MPI Studies on Intellectual Property, Competition and Tax Law Vol. 5, (Springer 2008) 117-135.

Graph: The Strength of Remedies as a Function of the Private/State Mix.



Source of the graph: Albert A. Foer & Jonathan W. Cuneo, 'Toward an effective system of private enforcement'[283]

As we can see from the above graph, left-side two models feature an enforcement scheme in which the competition authorities have injunctive powers and ability to impose fines. In this scenario, there is no antitrust damages mechanism, and the government has monopoly over the anti-competitive behaviour, so that the level of deterrence is minimal. Thus, in order to get the highest possible deterrence, it is a matter of coordinating public enforcement and private enforcement in an optimal way.[284]

As one moves across the graph to the right, the level of deterrence is increased as private damages measures are introduced. The model of "Follow-on Invade Public Fines"[285] means that the government has already imposed correct fines on the defendant, and the victims could claim damages from the fines. This model represents the minimalist private damages regime. In China, this model is not possible, because the private claimant never obtains damages from enforcement agencies.

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[283] Albert A. Foer and Jonathan W. Cuneo, 'Toward an Effective System of Private Enforcement', in Albert A. Foer, et al. (eds), *The International Handbook on Private Enforcement of Competition Law*, (1st edn, Edward Elgar 2010) 594. In this graph, six hypotheses of public and private remedy models are created by Foer and Cuneo. Among these remedies, "agency injunction" refers to the situation where the public agency could issue injunctive order, but no private enforcement is allowed. "Agency fines" means that the public agency could impose fines on the illegal behaviour. "Follow-on invade public fines" means that private victims could claim damages from fines imposed by the public agency. "Follow-on single damages" refers to the situation where damages claim is allowed to be brought before the court after public enforcement, but no multiple or punitive damages are allowed. "Stand-alone single damages" means that single damages claim could be brought without any public enforcement. "Stand-alone additional damages and incentives" means some punitive measures are added to the "stand-alone single damages", for example, multiple damages.

[284] Emil Paulis, 'Policy Issues in the Private Enforcement of EC Competition Law' in Urgen Basedow(ed), *Private Enforcement of EC Competition Law* (Kluwer Law 2007)15.

[285] It is assumed by Foer and Cuneo that under this model, total fines determined by the public enforcer already include possible damages that victims may claim.

The next more powerful model of "Follow-on Single Damages"[286] means that private damages can be claimed independently from the levied fine after the decision of infringement has been made by competition authorities. In this model, the level of deterrence apparently rises since the defendants have to take the risk of paying additional damages to private litigants in addition to government fines.

Moving further rightward in this graph, stand-alone litigation may be brought before a court *before* the breach decision is made by competition authorities, and victims could claim single damages, i.e. damages that are limited to the harm caused by the anti-competitive behaviour. In this model, the greater degree of deterrence is achieved since the potential infringer has to face the possibility of litigation brought by private parties, even if the competition authorities ultimately take no action. However, public enforcers generally have better investigational tools than private parties, and some discovery powers may not readily available to private plaintiffs in the cases of the *indirect* consumer who is harmed by anticompetitive behaviour, for example, the right to demand certain documents.[287] To some extent, the difficulties in finding evidence can dissuade the victims to file proper antitrust damages litigation.

These two models of follow-on and stand-alone single damages are available in China, as the Judicial Interpretation 2012 has confirmed that damages claim could be brought before or after infringement decision of public enforcers.[288] In theory, the stand-alone damages action produces more deterrent effect on anticompetitive behaviour than follow-on damages. However, in practice, it is not easy to bring a successful stand-alone litigation because of difficulty in access to certain evidence which the claimant needs to prove the breach, for example, some documents held by government or breaching companies are not available for claimants. The recent attitude of Chinese court as to the access to evidence has increased the burden of proof in a follow-on antitrust litigation,[289] needless to say the stand-alone action. Therefore, it is

[286] It is more deterrent than another follow-on model because in this model damages would be calculated separately from the fines which are already imposed by public enforcers.
[287] It is difficult for indirect consumers to provide effective evidence to persuade the court to grant them the discovery of some documents. See Lianos I., Davis P.& Nebbia P., *Damages Claims for the Infringement of EU Competition Law*, (Oxford University Press 2015) 39.
[288] Article 2 of the Judicial Interpretation 2012
[289] *Junwei Tian v. Beijing Carrefour Shuangjing Store and Abbot Shanghai*, (2005) 高民（知）终字第 02717 号. In the first instance of this case, Beijing IP court dismissed the plaintiff's damages claim, for the reason that the plaintiff failed to provide sufficient evidence to prove the existence of anticompetitive behaviour and the losses caused by the alleged

assumed that the simply stand-alone or follow-on damages could contribute limited deterrent effect on anticompetitive behaviour in China.

Finally, in this graph, we come to the right extreme that stand-along litigation is filed in a jurisdiction which permits harsher measures, such as treble damages; permitting easy standing of indirect purchasers; allowing for several and joint liabilities; collective actions and other incentives to victims.[290] In this model, the level of deterrence is maximised by those incentives.

This model is quite similar to the current US-style antitrust damages action. However, the US-style damages action has been criticised as it has caused unmeritorious litigation, and actually the US government has been considering some measures to limit antitrust damages actions in the US.[291] Therefore, it is argued that there is no one-size-fits-all private enforcement model to suit any jurisdictions since the competition culture, political values, legal and economic context and institutional capabilities vary among countries.

In China, to what extent private enforcement can assist in achieving optimal deterrence depends on the above-mentioned factors, such as competition culture, legal and economic context, and the effectiveness of public enforcement. More importantly, as the above graph shows, the optimal level of deterrence can only be achieved by combination of ideal public enforcement and ideal private enforcement. Private enforcement would necessarily contribute a greater level of deterrence as the AML is poorly and inefficiently implemented by the public agencies with regard to certain anticompetitive behaviour in China, even if the damages action plays a complementary role to the public enforcement in achieving deterrent effect. Therefore, overall, a climate supportive of deterrence in China should be nurtured in the first place, while building a well-balanced mechanism for the antitrust damages action, which on the one hand, approach maximal deterrence as possible as the policy permits, on the other hand, would not lead to over-deterrence and over-compensation.

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behaviour, even though the NDRC already made infringement decision as to the resale price maintenance behaviour and fined Abbot and other supplier, before the damages claim was initiated. This case was appealed to Beijing High Court. In 2015, Beijing High Court withheld the ruling of Beijing IP court.

[290] Among these measures, the standing of indirect purchaser, as well as joint and several liabilities are provided in the EU by Directive 2014. Collective action is allowed in some European States, for example, the UK.

[291] Hannah L. Buxbaum, 'Private Enforcement of Competition Law in the United States ----- Optimal Deterrence and Social Costs' in Jurgen Basedow(ed), *Private Enforcement of EC Competition Law* (Kluwer Law 2007)41,60.

As for specific measures, following chapters will discuss the design of a balanced mechanism of the antitrust damages action in China with considering the pursued goal of full compensation while also coordinating with optimal deterrent effect.

5. Legislative Recommendations concerning the Goals of Antitrust Damages Action in China

In China, ultimate objectives of antitrust damages action have been properly set by the Judicial Interpretation 2012 as to *prohibit anti-competitive behaviour*, *protect and promote market competition*, and *protect consumers' and public interest*.[292] This is also the ultimate objectives of the public enforcement of the AML. Specifically, the antitrust damages action, as an important form of private enforcement in China, its direct and primary goal should be further legislated in order to provide full compensation to victims of AML infringements for two reasons: first because the aim of public enforcement is not to compensate for the damage, but to deter future infringements; and second, only the antitrust damages litigation can provide an effective approach to the estimation of individual or collective losses caused by anticompetitive behaviour.

From the perspective of general civil damages claims, the purpose of the damages action is to obtain *corrective justice through compensation*.[293] The value of civil damages lies in the recovery of losses to place the harmed party back in the position they were in before the infringement had taken place. In the civil law system of China, the corrective justice is one of pillars[294] of the principle of fairness which is the ultimate objective pursued by the civil procedural system.[295] In antitrust context, although it is practically difficult to achieve truly corrective justice due to the economic complexity, economics has provides some helpful

[292] Preface of the Judicial Interpretation 2012.
[293] Paolisa Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?', E.L. Rev. 2008, 33(1), 23-43; also see Christian Diemer, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules', E.C.L.R. 2006, 27(6), 309-316; Elbert L. Robertson, 'A Corrective Justice Theory of Antitrust Regulation', Catholic University Law Review, Volume 49, Issue 3, Spring 2000.
[294] In addition to corrective justice, other pillars include commutative justice, attributive justice, and distributive justice, etc. Also see: YI J., 'New Interpretation on the Principle of Fairness in Civil Law', FaXueJia, 2012, Issue (4), 54-73 (in Chinese) .
[295] YI J., 'New Interpretation on the Principle of Fairness in Civil Law', FaXueJia, 2012, Issue (4), 54-73 (in Chinese).

analysis tools, such as econometric methods, effect analysis, instead of the traditional *per se illegal*[296], to assist in the pursuit of corrective justice in antitrust damages claims. Thus, the primary aim of antitrust damages litigation is justified to actively pursue compensation, rather than deterrence.

Furthermore, the full compensation principle requires that not only all victims, including direct and indirect purchasers, obtain compensation, but also that all the losses be recovered so that the situation is restored to the position as if the infringement had not occurred. Therefore, the direct goal of full compensation actively pursued by the antitrust damages action could effectively achieve the objective of protection of the public interest, especially the consumers' interest.

Therefore, in the combined public and private enforcement system of the AML, the effort to coordinate these two forms of enforcement should integrate the separate-task approach, under which public enforcement and private actions for damages are each assigned the task they are best at achieving.[297] Obviously, compared to public enforcement, private actions for damages are superior for the pursuit of *corrective justice* through compensation, then the optimal antitrust enforcement system would appear to be a system in which public enforcement aims at clarification and development of the law and at deterrence, while the private action for damages aims at achieving compensation.[298]

Meanwhile, it cannot be denied that the antitrust damages litigation could make some contribution to deterrence, as the complement to public enforcement, because it increases the likelihood of detection and costs of breach. However, due to the concern of over-deterrence (which is likely to suppress the pro-competitive economic activities),[299] it is the author's view that deterrence is regarded as a beneficial side-effect of the antitrust damages action, rather than an actively pursued goal of such action, otherwise, the US-style unmeritorious antitrust

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[296] For more discussion on *per se illegal* vs. *effect analysis*, please see Chapter 5 of the thesis; also see: Elbert L. Robertson, 'A Corrective Justice Theory of Antitrust Regulation', Catholic University Law Review, Volume 49, Issue 3, Spring 2000.
[297] Ioannis Lianos, Peter Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 231.
[298] W.P.J. Wils, 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages', (2009) 32(1) World Competition, 3-26.
[299] The Response of IP Tribunal of the SPC to the 2011 Consultation Paper of the Antitrust Damages Judicial Interpretation, available at: http://www.court.gov.cn/zixun-xiangqing-2578.html, accessed in November 2017.

litigation might occur in China.

As far as the extent of deterrent effect contributed by antitrust damages is concerned, due to the active pursuit of full compensation, the extent of trade-off in the expected deterrent effect needs to be highlighted as policy options and the specific measures are designed by Chinese legislators to achieve an optimal deterrence of the AML enforcement. Considering the level of deterrence already achieved by the increasingly enhanced public enforcement in China, the legislators must be cautious about the deterrent effect contributed by the antitrust damages action.

Therefore, in the premise of the existing objectives set by the Judicial Interpretation 2012, further judicial interpretation, or alternatively, an amendment to the AML, is needed to clarify the direct goal of antitrust damages action, which is to *establish a well-balanced antitrust damages action mechanism which ensures full compensation to be achieved, meanwhile, contributes certain level of deterrence as complementary to public enforcement, but not leads to over-deterrence*.

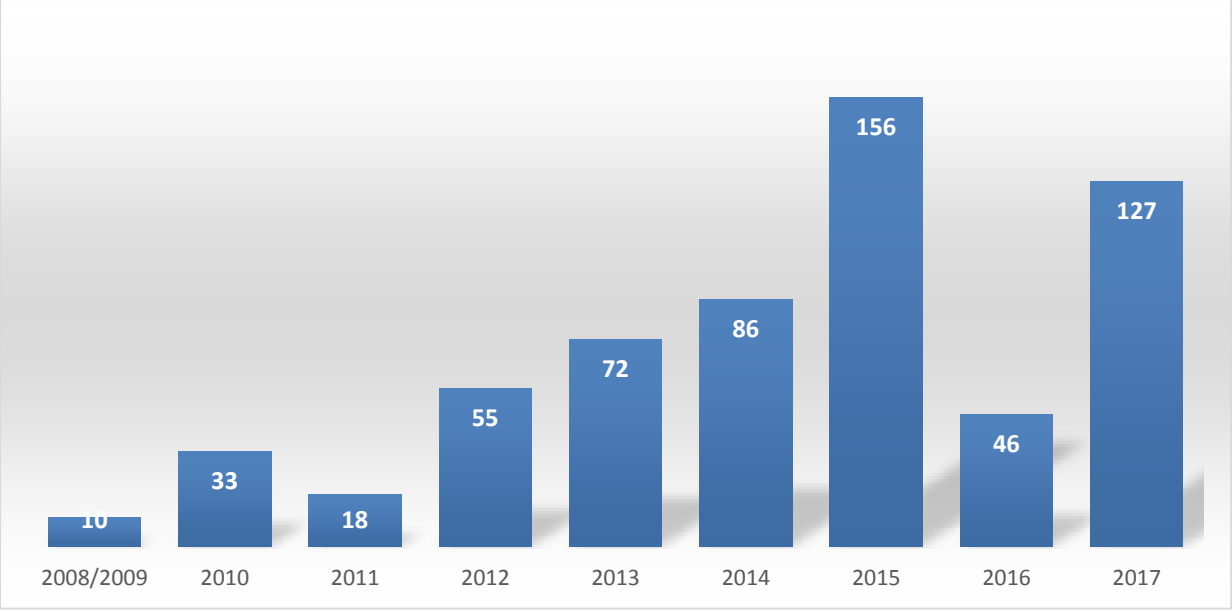
Chapter 3 Calculation of Antitrust Damages in China

1. Introduction

As identified in the Introduction Chapter of the thesis, the gaps in China's antitrust legislation have posed significant hurdles to the antitrust damages lawsuit under the AML. This chapter aims to the deal with one of gaps existing in the Chinese antitrust damages system, i.e., the quantification of antitrust damages, by referring to relevant EU laws, in order to propose a proper solution so as to improve the antitrust damages action mechanism.

Article 50 of the AML and its Judicial Interpretation 2012[300] provides that, damages claims are allowed to be brought before courts, and the victims of anticompetitive behaviour are entitled to claim compensation for the harm suffered. The antitrust damages claim, particularly follow-on actions, are increasingly brought, which is likely to be continued as a trend in China. Since the entry into force of the AML in August 2008, as following charts show, the number of the antitrust damages action has been soaring, from 10 cases filed before the court in 2008, to 127 cases filed in 2017, though with some fluctuations.

Changes in the number of cases before court since entry into force of the AML in 2008



Source of figures: from online published figures between year 2008 and 2017.[301]

[300] Provisions on Several Issues concerning the Application of the Law in Trials of Civil Dispute Cases Arising From Anti-competitive Behaviour, issued by the SPC in 2012, stipulates 16 general provisions on the antitrust damages action in China.

[301] For example, 2015 Competition Law and Policy Report of China, available at: http://bbs.cnipr.com/forum.php?mod=viewthread&tid=12280, accessed in January 2017; 2017 Competition Litigation

Among these cases, claimants have to go further in order to establish quantification of the damages rather than merely obtain a determination that there has been an infringement, because they want to get full compensation for their losses from defendants. This requires the court to ultimately determine an exact amount for the monetary award. While, the competition authorities only need to decide whether the anticompetitive effect of the infringement is significant so as to determine the fines based on the calculation of illegal gains of the infringer, rather than quantifying the victims' harm further.[302] In order to gain full compensation, claimants have to prove the amount of harm arising from the anticompetitive infringement, in which process the quantification of antitrust damages has become indispensable.

For the purpose of proving and quantifying antitrust damages, it is the economists' task to provide methods and techniques that can be employed by parties and courts in antitrust damages cases. The quantification of damages in antitrust cases is becoming a field where economics permeates into legal practice to the highest level. However, for legal scholars and practitioners, key issues in quantifying the damages rest not only on the choice and application of proper economic methods and econometric techniques, but also on the substantive and procedural mechanisms which govern the quantification, such as the employment of the economic expert evidence, and the relationship with the fines imposed by enforcement authorities.

In this respect, the AML and its Judicial Interpretation 2012, only provides very general provisions regarding antitrust damages action, such as joint hearing of relevant cases, limitation period and the expert evidence. As for the method of quantification, no relevant guidance is provided by the AML and its Judicial Interpretation which could be relied on by parties and courts in China. Ambiguity and gaps in the legislation have resulted in the uncertain and insecure status of the quantification of antitrust damages in China, and thus posed an obstacle to private enforcement of the AML.

Review, available at: http://www.anjielaw.com/uploads/soft/180122/1-1P122162P2.pdf, access in February 2018; Review of Ten-year's Enforcement of the AML, available at: http://www.saic.gov.cn/xw/mtjj/201709/t20170901_268793.html, accessed in December, 2017.

[302] Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers*, (1st edn, Oxford University Press 2011) 494. They noted that this is also the case in public enforcement of EU competition law. The EU competition authorities are restricted to give a decision of significant harm, never go further to quantify the victims' harm.

Whereas, the EU Commission, based on the Oxera Study[303] in 2009 and its relevant experience, issued a practical guide on quantifying harm arising from breaches of Article 101 and 102 TFEU in 2013.[304] The Guide 2013 provides a variety of economic methods for the quantification of antitrust damages, which could be used by courts, ranging from relatively simple methods, like *comparator-based approach*, to more complicated ones, like *market-structure-based* and *financial-analysis-based* approaches. As one of EU measures facilitating antitrust damages actions, the provision of specific quantifying methods has to a certain extent reduced ambiguity and arbitrariness in quantifying antitrust damages. Since these economic methods purely involve economic analysis and models, which are technical issues in the quantification rather than legal issue, these studies could give Chinese courts a helpful guidance as to how to deal with the quantification of antitrust damages and what essential factors need to be taken into account.[305]

The sophisticated statistical and econometric techniques are not the focus of the discussion in this chapter, instead, the chapter will concentrate its examination on legal issues arising from the application of economic quantification methods to real cases, which are also the key point to which the Chinese legislators and practitioners should pay more attention. The CJEU has produced some case law on how to make fair and reasonable quantification. By referring to the practice and experience of the EU, this chapter seeks to provide guidance on quantification of antitrust damages to Chinese courts and parties.

The Judicial Interpretation 2012 and the court rulings in recent leading antitrust damages cases in China, such as *Huawei v. InterDigital*[306] and *Ruibang v. Johnson & Johnson*[307], imply that the goal of antitrust damages litigation is to compensate for losses caused by anti-competitive

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[303] Oxera is an economic consultant agency which sets standard for economics, provides advice concerning economic issues related to competition, finance or litigation, etc. In 2009, requested by EU Commission, Oxera, with some competition lawyers, published a study report on quantifying antitrust damages towards non-binding guidance for courts, the report is available at: https://www.oxera.com/Oxera/media/Oxera/Quantifying-antitrust-damages.pdf?ext=.pdf, accessed in December 2017.

[304] EU Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013.

[305] Frank Maier-Rigaud & Ulrich Schwalbe, 'Quantification of Antitrust Damages', Document of LEM, <http://lem.icl-lille.fr/LinkClick.aspx?fileticket=icOQRDAd5ns%3D&tabid=1198&language=fr-FR> accessed 11-2016.

[306] *Huawei Technologies Co. Ltd v. InterDigital Group*, first-instance court: Shenzhen Intellectual Property People's Court, (Minchuzi No.858(2011)); Appellate Court: Guangdong High People's Court, Minsanzhongzi No. 306 (2013).

[307] *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.*, the first-instance trial: shanghai Intermediate People's Court, (Minchuzi No. 169, (2010)); Appellate Court: Shanghai High People's Court, (Minsanzhongzi No. 63, (2012)).

behaviour. This is consistent with the primary objective of full compensation established by the EU Directive 2014[308] and the CJEU's relevant case law.[309] On the other hand, as for the deterrent effect, the EU and China has held the same position that deterrence is not actively pursued by the antitrust damages action, so as to avoid overcompensation and overdeterrence.

This chapter is structured as followed. Following introduction, Section 2 provides a brief overview of conceptual foundations which are relevant to the quantification of antitrust damages, for instance, the scope and types of damages. The anti-competitive behaviour restricted by the AML can be grouped into some categories. Different types of anticompetitive behaviour may result into different types of harm. For example, the harm caused by cartel, includes that, in addition to the overcharge harm, the reduction in volume of sales, negative effects on quality and choice, and possible effect on cost level.[310] Then it will briefly present methods of quantification proposed by the EU Commission. The application of these methods is illustrated by examples of cases involving in different types of antitrust harm. Section 3 explores the relationship between antitrust damages awarded by courts and fines imposed by public authorities. Section 4 gives concluding remarks on the reform in this aspect to be taken in China.

2. Conceptual Fundamentals Relevant to the Quantification of Antitrust Damages

2.1 The Scope of Antitrust Damages that victims could claim before courts

Clarification of the scope of compensation that anticompetitive victims could claim from defendants is the first step of the quantification of antitrust damages. The EU law has

[308] Directive 2014/104, OJ L 349/1.
[309] The leading cases include Case C-453/99 *Courage Ltd v. Crehan* [2001], ECR I-6297; Case C-259-298/04 *Manfredi v. Lloyd Adriatico Assicuraziono Spa* [2006], ECR I-6619.
[310] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law', in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 127.

recognised that antitrust damages include not only the actual loss, but also the loss of profit and interest.[311] In China, the AML and its judicial interpretation 2012 failed to clarify the specific scope of antitrust damages. The EU's proposal and case law on the scope of antitrust damages may well provide a guidance to improve the clarity of the AML on the *scope* of antitrust damages.

2.1.1 The Relevant Legislation and Case Law in the EU

- **EU Legislation and Proposals**

EU Directive 2014/104 makes it clear that victims of anti-competitive behaviour have right to claim compensation not only for the actual loss, but also for the loss of profit and interest on damage.[312] Although the matter of civil proceedings is governed by national rules, the antitrust compensation for the actual loss, loss of profit and interest on damage[313] will be a general rule of Member States, and also the minimum level of antitrust damages. It is assumed that combined with other facilitating measures adopted by the EU, the clarification of basic elements of compensation would render the antitrust litigation an effective option to recover losses of anticompetitive victims, particularly for small companies and consumers, who have no enough power to bargain with cartels through meditation.

As a complementary measure to Directive 2014, a Practical Guide on Quantifying Harm in antitrust actions issued by the EU Commission, also stresses these three elements of antitrust damages[314], by referring to the ruling in the *Manfredi* case[315], in which the Court,

[311] EU Commission Staff Working Document, 'Practical Guide on quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013, para.1.
[312] Directive 2014/104, OJ L 349/1, para.12. The Directive was formally adopted by the Council on 10 November. Then it was official signed into law on 26 November, and published in the Official Journal on 5 December 2014. It shall come into force on the twentieth day following its publication in the Official Journal of the EU.
[313] According to the Commission, the payment of interest on damage is due to the consideration of effluxion of time. The interest should be due from the time that the harm occurred until to the time that the total amount of damages is paid. The base for calculating the interest, whether it is an integral part of actual loss or lost profit, or an independent head of the damages depends on national laws.
[314] EU Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013. Three elements include include actual loss, loss of profit and the interest on damage.
[315] Joined cases C-295/04, C-296/04 and C-298/04, *Manfredi and others v. Lloyd Adriatico Assicurazioni Spa and Others,* [2006] ECR I-6619, 95.

considering the *principle of effectiveness* and the EU right to claim compensation for the antitrust harm, held that the victim must be able to obtain the full compensation. The Guide further defines that the actual loss is the reduced assets of the victim; the loss of profit is their increased assets, which they should have obtained if the infringement had not happened.[316] This Guide was designed by the Commission to propose the approach to quantifying harm in competition cases. The clarification of the scope of damages in the legal context part of the Guide has signified that the Commission has recognised these elements as the foundation for the further quantification of antitrust damages.

The adoption of Directive 2014 is the result of the Commission's ten-year's endeavours, including the Green Paper in 2005[317], the White Paper in 2008[318], and a *Proposal* for Directive on antitrust damages actions in 2013. In its 2013 *Proposal*, it has already proposed that the antitrust compensation should not only cover the actual loss, but also gains deprived due to the infringement, and the interest on the loss.[319]

However, looking back to the 2005 Green Paper, the Commission has not reached a consensus on this issue. In 2005 the Commission for the first time put forward the issue of actual scope of antitrust damages in its Green Paper. The question of whether the definition of antitrust damages should be based on the losses suffered by victims, or the illegal gains made by infringers, had been raised in Green Paper 2005.[320]

Some commentators were opposed to the view that the estimation of antitrust damages should be based on infringers' gains derived from the breaches. They argued that the damages based on infringers' gains would be punitive in nature.[321] The *punitive* nature of antitrust damages is clearly contrary to the *compensation* objective that the Commission aims to achieve in the

[316] EU Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013. Also see the Opinion of Advocate General Capotorti in Case 238/78 *Ireks-Arkady GmbH v. Council and Commission* [1979] ECR 2995, 9.
[317] Commission Green Paper 2005, COM (2005) 672 final.
[318] Commission White Paper 2008, COM (2008) 165 final.
[319] Commission Proposal for a Directive on Antitrust Aamages Action, COM (2013)404 final, sec.1.1.
[320] Commission, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules', COM (2005) 672 final. sec. 2.3
[321] Thorsten Mager & Thomas B. Paul, 'The Interaction of Public and Private Enforcement---- The Calculation and Reconciliation of Fines and Damages in Europe and Germany' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 96.

antitrust damages action. It is further believed that the *infringers' gains-based damages* would be likely to lead to "unjust enrichment", since victims could claim part of the infringers' gains even if such part exceeds their actual losses.[322] Moreover, from the perspective of restoration it seems unjust to award victims with larger amount of compensation than the actual loss they in fact suffered.[323]

The Green Paper also invited insights into whether antitrust damages should include interest on damage, and how the interest would be calculated.[324] By referring to the ruling in *Marshall*[325], which concerned an employment dispute between Ms Marshall and her employer, it is argued that the 'effluxion of time', as one of the account factors, should be taken into consideration for the compensation purpose.[326] Indeed, the value of money may reduce with the eclipse of time. Moreover, from an economic perspective, the loss of interest on damage[327] is closely related to the uprating of the cash flow, which requires moving cash flows between time periods according to legal rules.[328] Although *Marshall* is not an antitrust case, it did provide valuable reasoning that the interest on damage should constitute a necessary part of the compensation in cases claiming economic losses. Moreover, the judgment in *Manfredi*, a case concerning the price-fixing anti-competitive agreement, cited the ruling of *Marshall* to emphasize the necessity of the interest on damage to achieve full compensation for antitrust damages.[329] Therefore, the lost interest on damage has to be an essential element in the award of antitrust damages.

Regarding the way to calculate the interest, it is related to the interest rate and the date from

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[322] Ibid.

[323] Roger Van Den Bergh, Willem van Boom and Marc van der Woude, 'The EC Green Paper on Damages Actions in Antitrust Cases', (Erasmus University Rotterdam April 2006), available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/erasmus_university.pdf> accessed 04-12-2015.

[324] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2005) 672 final. sec. 2.3.

[325] Case C 271/91, *Marshall v Southampton and South West Hampshire HealthAuthority(Teaching)*, [1993] E.C.R. I-4367.

[326] Commission Staff Working Paper Annex to the Green Paper on Antitrust Damages Actions, SEC (2005) 1732, COM (2005) 672 final, para.122.

[327] According to the Commission, the payment of interest on damage is due to the consideration of effluxion of time. The interest should be due from the time that the harm occurred until to the time that the total amount of damages is paid. The base for calculating the interest, whether it is an integral part of actual loss or lost profit, or an independent head of the damages depends on national laws.

[328] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014)137.

[329] Joined cases C-295/04, C-296/04 and C-298/04, *Manfredi and others v. Lloyd Adriatico Assicurazioni Spa and Others,* [2006] ECR I-6619,97.

which the interest is calculated, both of which to some extent affect the level of compensation. The underlying principle for determination of the two components is to ensure that the real value of harm is compensated at least.[330] With respect to the date from which the interest is calculated, there are several options, for instance, the date of infringement, the date of injury or the date of filing litigation.[331] The national rule as to choosing this date vary among the Member States. The UK courts, for example, have discretion over this issue. Considering the 'in times of high inflation when interest would not be any form of acceptable compensation', the court could choose the date of judgment for calculating interest, though the general rule of UK courts is to measure the interest from the date of injury.[332]

It is noteworthy that setting a very high level of interest which exceeds the real value of compensation would to some degree make antitrust damages serve a deterrent purpose.[333] The CJEU has developed some case law on this potential deterrent effect of the interest, which will be examined in the following part.

Due to the debate on the scope of antitrust damages put forward in the Green Paper, White Paper 2008[334] further ascertained the scope of antitrust damages. First of all, the principle of *full compensation* was established as a primary guiding principle for the antitrust damages action[335], i.e. it requires compensation for the entire harm. The White Paper confirmed the proposition in the Green Paper that antitrust damages include not only the actual loss arising from price increases[336], but also lost profits due to the reduction in sales. The White Paper also made it clear that the loss of interest on damage should be included in antitrust damages[337], as the award of interest is particularly relevant to the compensation for the real value of harm suffered.[338] Therefore, these three heads constitute basic elements of antitrust damages. The

[330] Commission Staff Working Paper Annex to the Green Paper on Antitrust Damages Actions, SEC (2005) 1732, COM (2005) 672 final, para.123.
[331] Ibid.
[332] *Crehan v. Inntrepreneur Pub Company and another* [2003] EWHC 1510 (Ch).
[333] Commission, 'Staff Working Paper Annex to the Green Paper on Antitrust Damages Actions', SEC (2005) 1732, COM (2005) 672 final, para.124.
[334] Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final.
[335] Commission White Paper on Antitrust Damages Actions, COM (2008) 165 final, sec.1.2.
[336] For example, in a typical cartel agreement, in order to grab the high profits, the cartel members collude to raise the price of their product, which is unreasonably higher than the actual price in a competitive market. Their customers pay more for the product than they would have paid in a non-cartel market. The increased price is the part of the overcharge, which constitutes part of harm caused to customers by the cartel.
[337] Commission Staff Working Paper accompanying White Paper on Antitrust Damages Actions, SEC (2008) 404, para.180.
[338] Commission Impact Assessment Report accompanying White Paper on antitrust damages action, SEC (2008) 405,

White Paper also suggested that the three basic elements should be codified into the EU legislation[339], to make the principle of full compensation an effective principle among the Member States.

Finally, as mentioned above, Directive 2014 recognises the three elements, including the *actual loss, loss of profit, and interest on damage*, of antitrust damages as the legally binding definition on the scope of antitrust damages for the EU Member States.

- **The CJEU case law**

The CJEU has confirmed the right of victims to compensation for the harm due to anticompetitive infringements in many cases.[340] In some of these cases, the Court gave further explanation on the scope of antitrust damages.

In *Manfredi*, the Court confirmed that the purpose of compensation is to restore victims back to the situation as the infringement had not happened.[341] It further determined the scope of full compensation, namely the injured person must be able to obtain compensation for the actual loss, loss of profit, plus interest on the damage. It explained that the loss of profit and payment of interest are essential components of the antitrust compensation without which reparation for harm is impossible.[342]

Prior to *Manfredi*, the Advocate General, in *Ireks-Arkady GmbH v. Council & Commission*, had already clarified that the actual loss is the reduced assets of victims; and the loss of profit is equal to the increased profits on these assets without the infringement.[343] In its judgment, although the Court, failing to touch on the part of lost profit, only ordered the defendant to pay the applicant the amount equivalent to the refund that the applicant would have obtained without the infringement, it went further to order the defendant to pay interest at the rate of 6%

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para.65.

[339] Commission White Paper on Antitrust Damages Actions, COM (2008) 165 final, sec.2.5.

[340] The leading cases are Case C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297, 26; Joined Cases C-295/04 to C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619,60; Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161,36 and case C-199/11. *European Community v. Otis NV and others*, EU:C:2012:684, [2013] 4 CMLR 4.

[341] Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-5161, 36. Also see EU Commission Guide on Quantification of Harm in Antitrust Actions, COM (2013) 3440.

[342] C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, paras.95-97.

[343] Opinion of Advocate General Capotorti in Case 238/78 *Ireks-Arkady GmbH v. Council and Commission* [1979] ECR 2995,9. It is referred to in EU Commission Practical Guide on Quantifying Harm in Antitrust Damages Actions, SWD (2013) 205.

based on the amount of the refund in this case.[344] Since the loss in profit was not advanced by applicant in the claim, the Court only ruled that the Commission should compensate for the actual loss, namely the production refunds, and the interest on the loss. Nevertheless, the basic goal pursued by the Court in *Ireks-Arkady GmbH* was same as that in *Manfredi*, which is recovery of the damage of victims.

As to the loss of profit, most jurisdictions have increasingly recognised that it is an integral part of antitrust compensation. Competitors of the infringer are usually the ones who claim the loss of profit because their ability to compete and gain profits is harmed as a result of the infringement.[345] However, it is much more difficult to prove and estimate it than the actual loss.

With respect to the award of interest when calculating damages, it is a logical consideration on the time value of money, which, as the EU Commission noted, is one aspect of the *compensation principle*.[346] In *Marshall*, the Court considered the award of interest in a case concerning a claim for compensation for damages sustained by Ms Marshall as a result of her dismissal by her employer. As regards the award of interest, the Court further held that 'full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purpose of restoring real equality of treatment.[347] It is observed that the aim of the Court is to compensate the real value of the victim's loss.

Although in *Marshall*[348], the applicant sought to claim compensation from her employer due to gender discrimination, rather than anti-competitive behaviour, it involved the grant of damages award for individual's economic losses. In this case the argument about the calculation

[344] Case 238/78 *Ireks-Arkady GmbH v. Council and Commission* [1979] ECR 2995, 20.
[345] Hanna Stakheyeva, 'Removing Obstacles to a More Effective Private Enforcement of Competition Law' (2012) E.C.L.R., 33(9), 398-405.
[346] Oxera, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', (December 2009), available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed in October 2015, sec. 2.5.2.
[347] Case C-271/91 *M Helen Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, [1993] 3 CMLR 293, para.31.
[348] Ibid.

of damages, particularly the interest on damage, is worth referring to in cases concerning the compensation for economic losses arising from anti-competitive behaviour. In terms of payment of interest on the damage, the Court in *Manfredi*[349] referred to the judgment of *Marshall,* holding that the award according to the applicable national rule constitutes an essential component of compensation. Therefore, as the Court in *Manfredi* stressed that, under the *principle of effectiveness* and the individual's right to compensation, antitrust damages not only include the actual loss, but also the lost profit and the interest on the damage.[350] Furthermore, it is argued that the ruling in *Manfredi* regarding payment of interest should be considered as covering the whole period from the time the damage occurred until the capital sum awarded is actually paid[351], which is consistent with the goal of full compensation.

In *Marshall*, the Court further drew distinction between *statutory interest* and *compensatory interest*. Statutory interest is the interest on the compensation awarded by the court in the judgment. It is awarded from the date on which the judgment is delivered. Whereas compensatory interest, as a component of total compensation, is decided by the judge. The amount of compensatory interest depends on the extent to which the court considers the development of the damage. The answer is different according to the type of interest. As for the statutory interest, it is an obligation to pay it in full as from the judgment in which the court determined the amount of damages.[352]

For another type of interest, the *compensatory interest*, the Court warned that as an upper limit may be imposed on compensation by the national law, it would lead to inadequate compensation for the harm, since it would prevent the important component of damage from being compensated by the award of compensatory interest.[353] The Court further held that such upper limit on the compensation would be incompatible with the relevant EU law[354], if it has

[349] Joined Cases C-295/04 to C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[350] Ibid., para.100.
[351] Case C-271/91, *M Helen Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, [1993] 3 CMLR 293 para.31, and Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SPA and others* [2006] ECR I-6691.
[352] Case C-271/91, *M Helen Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, para.23.
[353] Ibid., para.27.
[354] The relevant EU law here is referred to as Article 6 of the Directive (76/207/E.E.C.), which is the main provision relied on by the *Marshall* Case C-271/91 [1993], ECR I-4367.

the effect that the compensation is adequate for the damage sustained. It is evident that full compensation is the goal pursued by the Court in *Marshall*, which is the reason why it was followed and referred to by the Court in *Manfredi*.

In determining the loss of interest, both the interest rate and the point in time from which interest is awarded, affect the level of compensation. If the court choose an earlier point in time, such as the date of the infringement or injury, it would have awarded higher compensation, arguably beyond real value. Such an award would have departed from the compensatory basis and resulted in a punitive basis.[355]

The EU law failed to provide the general rule as to from what time point interest should be awarded. The national courts have discretion on this matter. The English High Court, in *Crehan*, pointed out that although the normal English rule is that damages are assessed at the date of loss, this is not an invariable rule of law and it may be that the justice of the case requires damages to be measured at the date of judgment, e.g. "in times of high inflation when interest would not be any form of acceptable compensation".[356] Both the High Court and the Court of Appeal in this case accepted that the victim would have obtained full recovery of the losses occurred during the period of two-year lease, if liability was established. But the two Courts diverged on the calculation of the lost profit. The High Court held that Mr. Crehan was entitled to compensation for actual losses and lost profits, and further held that the lost profit should include the profit that he would have been made from 1993 to 2003.[357] Whereas the Court of Appeal in this case took a restrictive position on the calculation of the lost profit between 1993 and 2003, holding that it was a wrong basis to calculate the hypothetical profit of a hypothetical business as damages.[358] Therefore, the Court of Appeal awarded the damages equal to the real value of the lease in the absence of the tie just in 1993, ignoring the alleged lost profits after 1993.

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[355] Ariel Ezrachi, *EU Competition Law----An Analytical Guide to the Leading Cases*, (3rd edn, Oxford and Portland, Oregon 2012) 507.
[356] *Crehan v Inntrepreneur Pub Co (CPC)*, CH 1998 C801 [2003] EWHC 1510(Ch) para.267.
[357] Ibid, para.281.
[358] *Crehan v Inntrepreneur Pub Co (CPC)*, [2004] EWCA Civ 637, para.172-179. Regarding the tie agreement breached article 101 TFEU, the judgment of the Court of Appeal was overturned by the House of Lord, so the issue of quantification of damages has not been touched by the House of Lord in this case.

From the EU relevant legislation and leading cases concerning the full compensation for antitrust damages, it is believed that full compensation has all the time been the primary goal of the antitrust damages action. In pursuing this goal, the first and foremost consideration is the definition of scope of antitrust damages, including not only the actual loss, but also the loss in profit and interest on the damage amount. Besides, the interest rate and the time from that the interest start calculating are also important factors as they may affect the level of compensation in antitrust cases. EU experience in this regard could fill the gaps in the AML and its 2012 Judicial Interpretation, by providing valuable guidance for the proper calculation of antitrust damages.

2.1.2 The Relevant Legislation and Cases in China

2.1.2.1 Lack of Clarity in the Legal Rules

- **The AML**

The AML and its judicial interpretation 2012 fail to provide specific provisions on the scope of antitrust damages. The 2012 judicial interpretation generally announces that the courts may order defendants to compensate for losses due to their anti-competitive behaviour.[359] The courts may include reasonable expenditures paid by the plaintiff for the investigation of, and putting a stop to the anti-competitive behaviour, such as the application for an injunction to the court, on the basis of the request of plaintiff.[360] Since the payment of reasonable costs is based on the request of plaintiff, these costs should not fall within the basic elements of antitrust damages, and should belong to a separate category of compensation which could be claimed by victims.

Therefore, neither the AML nor its 2012 Judicial Interpretation specifically defines what constitute antitrust damages.

[359] Article 14 of the AML Judicial Interpretation on several issues concerning the Application of the law in trials of civil dispute cases arising from monopolistic acts, issued by the SPC in 2012.
[360] Article 14 of the AML Judicial Interpretation on several issues concerning the Application of the law in trials of civil dispute cases arising from monopolistic acts, issued by the SPC in 2012, para.2.

- **Other applicable laws in China**

While, provisions of the 2012 Judicial Interpretation was formulated based on the AML, the Tort Law and the Contract Law.[361] On the other hand, the antitrust damages action is in essence processed by the courts through civil proceedings.[362] Therefore, the Tort Law and Contract Law are applicable laws governing antitrust damages actions *in addition to the AML* and its Judicial Interpretation 2012. Since the AML failed to provide specific regulations governing the scope of compensation for the harm arising from anti-competitive behaviour, the scope of antitrust damages could be defined by resorting to general rules about the civil liability as established in Chinese Contract Law and Tort Law.

According to types of anticompetitive behaviour which caused the harm, antitrust actions could be categorised into *tort-based damages actions* and *contract-based damages actions*. Generally speaking, tort is the infringement of a civil right, which could be the right to life, health, personal image, privacy and ownership right and beneficiary right, etc.[363] In the context of antitrust damages liability, examination on tort focuses on the violation of property rights, such as ownership and beneficiary rights. In tort-based damages actions, the economic loss is defined according to the market price when the injury occurred.[364] As for the contract-based damages actions, the amount of damages is equal to the loss caused by the breach of contract, including the anticipated interest[365] from the performance of contract, which should not exceed the loss which has been anticipated or should have been anticipated at the time of signing the contract.[366]

It is examined that neither the Contract Law nor Tort Law could cover certain explicit elements of antitrust damages, as provided in the EU case law, such as the loss of profit and the interest on damage, and how to calculate them, which resulted into ineffectiveness of the antitrust

[361] Preamble to the AML Judicial Interpretation on Several Issues Concerning the Application of the law in Trials of Civil Dispute Cases Arising from Monopolistic Acts.
[362] Article 1 of the AML Judicial Interpretation on Several Issues Concerning the Application of the law in Trials of Civil Dispute Cases Arising from Monopolistic Acts.
[363] Article 2 of Tort Law of China.
[364] Article 19 of Tort Law of China.
[365] The anticipated interest is also named the obtainable interest by scholars and practitioners in China. In contract law of China, it is usually referred to the profits expected to be obtained by the parties based on the performance of the contract when signing the contract.
[366] Article113 of the Contract Law of China.

damages action in China, because antitrust victims cannot obtain full compensation for their losses.

Besides, as antitrust cases used to be closely linked to the intellectual property laws in China, and the competent AML courts must have capability of dealing with complex legal and economic analysis, which is essentially the same as the courts designated to hear intellectual property cases, therefore, first-instance antitrust damages litigations are heard by Intellectual Property(IP) Tribunals set up within some of intermediate courts in China.[367] The courts tend to apply the method of establishing intellectual property damages to antitrust damages cases. In cases seeking compensation relevant to intellectual property, the statutory damages have been applied to most cases.[368] However, the laws[369] which apply to define IP damages are currently full of uncertainty and have triggered lots of controversies. The damages should be awarded based on the plaintiff's economic losses. Despite the strict conditions and factors which should be taken into account to determine damages according to the relevant IP laws, in practice, the courts still exercise considerable discretion to decide the amount of damages in IP cases.[370] Thus, due to the lack of suitability, relevant IP laws regulating the damages liability cannot be referred to in determining antitrust damages.

2.1.2.2 Scope of Antitrust Damages in High-profile Cases

Since the Chinese law regarding the definition of antitrust damages are unspecific and ambiguous, the competent courts are granted considerable discretion on this issue. This has led to the award of antitrust damages decided on case-by-case basis, which increases the uncertainty of judgment and prevents victims from filing antitrust litigation. Among the cases

[367] The Chinese court system consists of local courts, special courts and the Supreme People's Court. The local courts are divided into high People's courts, intermediate People's courts and basic People's courts. The intermediate People's courts are set up at the level of prefectures, autonomous prefectures, and municipalities. According to the antitrust damages Judicial Interpretation 2012, the first-instance AML cases are normally heard by some of intermediate People's courts. IP Tribunals are the courts especially designated for hearing intellectual property cases. They are usually set up in the high courts, and some of intermediated courts. Since 2014, the independent IP courts have been established in the Beijing, Shanghai and Guangzhou cities as the IP cases have significantly increased recent years in these cities. Also see: Xiuting Yuan and Paul Kossof, 'Developments in Chinese Anti-Monopoly Law: Implications of *Huawei v. InterDigital* on Anti-Monopoly Litigation in Mainland China', (2015) E.I.P.R., 3797, 438-441.

[368] The overwhelming majority of the Chinese IP cases was applied the statutory damages: 78.54%of copyright cases, 97.63% of trademark cases and 97.25% of patent cases. Also see Zhang Wei, 'Low Overall Damages Amounts for Intellectual Property Infringement', Legal Daily, April 18, 2013.

[369] The laws here refer to the Trademark Law, Copyright Law, Patent Law of China and their supplementary regulations.

[370] Xiuting Yuan & Paul Kossof, 'Developments in Chinese Anti-Monopoly Law: Implications of *Huawei v. InterDigital* on Anti-Monopoly Litigation in Mainland China', (2015) E.I.P.R., 3797, 438-441.

brought before the courts so far, plaintiffs have lost in most of these cases. In only a small fraction of these cases, victims have been awarded damages, which were still not enough to recover their real loss due to the ambiguous scope of antitrust damages.

- ***Huawei v. InterDigital***[371]

Huawei is a leading company in developing, manufacturing and selling electronic communication equipment in China. It also ownes a number of standard essential patents in this area. InterDigital, a US company, mainly engaged in patent licensing activities rather than substantial manufacturing in the field of electronic communication. Both Huawei and InterDigital were the member of the European Telecommunication Standards Institute (ETSI).[372] All the members have to obey the ETSI's principle of fairness, reasonability and non-discrimination in terms of authorising their patents to other members. In the ETSI, InterDigital declared that it owned a considerable number of essential patents and patent applications in the area of wireless communication technology in the US and China.

Since November 2008, Huawei and InterDigital started negotiations about the patent licence royalties. After several rounds of negotiation, Huawei found that the price offered to Huawei was much higher than those offered to Samsung and Apple for single patent licence and patent licence rates. In 2011, Huawei brought a lawsuit against InterDigital before the Shenzhen Intermediate People's Court[373], alleging that InterDigital had abused its dominant position in the wireless communication market by excessive pricing for patent licence and other unreasonable trade practices. Huawei also claimed RMB 20 million (approximately £2 million) for its economic losses.

The court ruled in favour of Huawei, ordering InterDigital to cease over-pricing and other anti-

[371] *Huawei Technologies Co. Ltd v. InterDigital Group*, first-instance court: Shenzhen Intellectual Property People's Court, (Minchuzi No.858(2011)); Appellate Court: Guangdong High People's Court, Minsanzhongzi No. 306 (2013).

[372] The intellectual property right policy of ETSI aimed to reduce the risk to the members of the ETSI and others applying the standards and technical rules of the ETSI, so as to avoid the waste of capital investment on the adoption and application of the standards due to the unavailable essential intellectual property right. To achieve this objective, the ETSI sought a balance between the needs of standardisation for public use in the field of telecommunication and the rights of the owners of intellectual property. The ETSI provided that each member shall use its reasonable endeavours to inform the TESI of its essential intellectual property rights.

[373] Since the first-instance AML cases are usually heard by intermediate People's court, this case was heard by the IP Tribunal within Shenzhen Intermediate People's Court.

competitive activities, and awarding £2 million to Huawei. InterDigital appealed against this decision to Guangdong High Court. However, in 2013 the High Court dismissed InterDigital's appeal, upholding the Intermediate Court's judgment.

In terms of the £2 million damages award, Huawei failed to prove their actual losses caused by the InterDigital's tortious behaviour, as well as InterDigital's actual profits accrued from its own tortious behaviour in this case. Despite this, the lower court, considering the nature of behaviour and relevant circumstances, including the degree of defendant's fault, the time period that the tortious behaviour lasted and the negative impact of the anti-competitive behaviour on Huawei, ruled that Huawei should be awarded approximately £2 million antitrust damages from the defendant. Both parties appealed against this judgment to the High Court. The High Court upheld the lower court judgment concerning the antitrust damages award.

This case has attracted lots of attention from the international community since it involved both Intellectual Property law and the AML of China. Moreover, in China, antitrust damages cases are usually adjudicated by IP Tribunals of competent intermediate courts. Thus, the courts tend to apply the method of dealing with IP-related damages to antitrust damages cases. The criteria "the nature of behaviour and circumstances"[374] is so ambiguous and broad that leaves too much room to the discretion of judges. To a certain extent, the overly-broad undefined criteria has discouraged victims from bringing antitrust damages lawsuits since they are not able to predict how judge would decide their cases and further the result of their cases.

Arising from the complexity of antitrust lawsuits and the difference from pure IP cases, a further judicial interpretation specifically on the scope of antitrust damages is needed to be issued to guide the court as to how to define and calculate antitrust damages.

- ***Ruibang v. Johnson&Johnson***[375]

[374] The judgment of Guangdong High Court in *Huawei Technologies Co. Ltd v. InterDigital Group*, (2015) 粤高法行终字第 228 号, Section 5 on issue of reasonability of damages amount in the ruling of first-instance in this case.

[375] *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.*, the first-instance trial: shanghai Intermediate People's Court, (Minchuzi No. 169, (2010)) ((2010) 沪一中民五(知)初字第 169 号); Appellate Court: Shanghai High People's Court,(Minsanzhongzi No. 63, (2012)) ((2012)沪高民三(知)终字第 63 号).

In this case, Johnson & Johnson (J&J) was a medical instruments and products provider in Chinese medical market. Ruibang, as one of the distributors of J&J, maintained a distribution arrangement with J&J for 15 years. In July 2008, J&J cancelled Ruibang's right to distribute J&J products as Ruibang took part in a bid to a hospital in Beijing at a lower price than the minimum resale price stipulated in the distribution agreement with J&J.[376] As a consequence, J&J rejected Ruibang's supply request in September 2008, and also refused to renew the distribution agreement with Ruibang at the beginning of 2009.

In 2010 Ruibang filed a lawsuit against J&J to Shanghai Intermediate Court, alleging that the resale price provision in the distribution agreement between them violated Article 14(2) of the AML[377], and asking for compensation for its loss of RMB 14.4 million. Ruibang lost the case in Intermediate Court as it failed to prove that the resale price provision restricted or eliminated competition in the relevant market. Then Ruibang appealed to Shanghai High Court, which reversed the first-instance judgment and ruled that J&J should compensate Ruibang for its profit loss of RMB 530, 000.

As for this case, although the public focus was mainly on whether the resale price maintenance has the effect of eliminating or restricting market competition, as well as on the burden of proof concerning the anti-competitive effect of resale price provision, it is noteworthy that the High Court decision on antitrust damages calculation has been of significance in implication to the future antitrust damages action.

The High Court examined in detail elements of antitrust damages claimed by Ruibang, deciding that the loss of profit which has a direct causal relationship with the anti-competitive behaviour, namely the resale price maintenance provision in this case, could be compensated, which means the victim could only claim back part of the lost profit directly caused by the infringement. The Court further held that such part of loss should be calculated according to the normal profit rate in the relevant market, rather than the profit rate under the resale price maintenance provision

[376] According to a letter from J&J to Ruibang in July 2008, J&J also accused Ruibang of bidding for a hospital outside of its authorized territory, which was provides in their distribution agreement. However, the restriction of authorized territory has fell outside of the antitrust claims in this case.

[377] Article 14(2) of the AML expressly prohibits the undertakings from restricting the minimum resale price to third parties in their trading agreements with their trading partners. Such agreements are of monopolistic nature.

included in their previous distribution agreement. It is observed that the resale price maintenance provision itself is the prohibition of the AML, thus the profit rate contained in such provision cannot be relied on by the Court to calculate antitrust damages.

In determining the product's normal profit rate in the relevant market, the Court took into account the price of similar products in the relevant market, the tax imposed on the victim, and the profit allocation between the distributor and supplier. These factors have played a dominant role in the calculation of the normal profit rate.

Since the anti-competitive behaviour in *Ruibang* case involved a resale price maintenance provision included in the contract, the way in which the Court determined the scope of antitrust damages in this case has reflected the Court's attitude on the relationship between the AML and Contract Law.[378] The general rule underlying the Court's practice is that the harm which was caused by a contract and was not the direct result of anticompetitive infringement would fall outside of the scope of antitrust damages. In *Ruibang*, the victim claimed the loss of prospective sales and profits for the following year 2009, on which part the Court refused to award compensation because it was not directly caused by anticompetitive behaviour and could be explained by theory of contract termination in the Contract Law.[379]

Other losses claimed by Ruibang, such as the costs spent on the marketing the products of J&J, harm to business reputation, spending on staff redundancy, loss of overstock, was not calculated as antitrust damages since they lacked direct causal link with the resale price maintenance provision in their distribution agreement.[380]

The final judgment concerning the civil liability in *Ruibang* case suggested that the profit loss should fall within the scope of antitrust damages. This case will provide guidance that only the

[378] Before this monopoly lawsuit, J&J brought a suit against Ruibang for not paying for goods supplied by J&J, and claimed damages of about £300,000. This contract case was adjudicated by a lower court in favour of J&J. The appeal also failed in intermediate court. In response to the failure of this contract case, Ruibang brought a monopoly lawsuit which is discussed here.

[379] According to Article 113 of Chinese Contract Law, when the contract terminates because one party fails to perform the contract, the amount of damages another party could claim shall be equivalent to his actual loss resulting from the breach, provided that the amount shall not exceed the likely losses which is foreseen or should have been foreseen by the breaching party at the conclusion of the contract. This provision allows the damages to be calculated under the predictable losses, which is independent of the damages in the antitrust lawsuit.

[380] Such heads of losses might be claimed through contract lawsuit, which could be brought independently from this suit. However, in this case, Ruibang lost its case in previous contract dispute.

loss which has direct causal link with the anticompetitive behaviour could be compensated by the infringer. Specifically, as for the antitrust lawsuit involving the resale price maintenance provision in a contract, this case has sent a clear signal that the calculation of lost profit should be in accordance with the normal profit rate of similar product in the relevant market rather than relevant contract law principles.

It is worth mentioning that in 2013, the NDRC has conducted a series of investigations against such resale price maintenance behaviour in China.[381] For example, in February 2013, the two local branches of NDRC, which are Sichuan DRC and Guizhou Price Bureau imposed large fines of RMB 449 million(approximately £44.9 million) on the Maotai and Wuliangye, which are two leading brewers in China, for resale price maintenance.[382] Another example is the infant formula case. In August 2013, several infant formula manufacturers were fined by the NDRC for minimum resale price maintenance in the distribution agreements.[383] However, after the public enforcement against these infringements, victims of these infringements have not brought antitrust damages litigation before the courts, seeking compensation for the harm caused by the resale price maintenance so far. Besides, enforcement authorities have no position to take into account the compensation for the harm caused to victims in these cases. Therefore, it is predicted that provided more measures facilitating antitrust damages litigation are in place in China, victims in such cases would bring follow-on litigations to claim compensation for their losses due to such anticompetitive behaviour, on the basis of infringement decisions of enforcement authorities

[381] NDRC is one of the competition authorities in China. It is responsible for investigation and punishment of the price-related monopolistic behaviour.
[382] See Sichuan DRC's press release, decision on Spirits, available at: <http://finance.chinanews.com/cj/2013/02-22/4588651.shtml>, Guizhou Price Bureau's press release, <http://www.chinanews.com/cj/2013/02-22/4588648.shtml> accessed 14-Jan 2016.
[383] See NDRC's press release, decision on infant formula, available at: <http://finance.china.com.cn/consume/special/NFFLD/index.shtml> accessed 14-Jan 2016.

2.1.3 Evaluation and Recommendation on the Scope of Antitrust Damages

2.1.3.1 The Necessity of Defining the Scope of Antitrust Damages

The intention of Judicial Interpretation 2012, is assumed to encourage more victims to bring private litigations before the courts, and to establish the role of private action as a complement to public enforcement of the AML. However, the relevant provisions remain silent with respect to the scope of antitrust damages. The reference to general civil damages rules involving contractual and tort disputes suggest that the AML provisions fail to deal with complications as to definition of antitrust damages in order to award full compensation to victims.

Ambiguity on the definition of antitrust damages has resulted in dismissal of some damages claims. For example, in *Ruibang*[384], the court refused Ruibang's damages claim on the predictable profits and other expenditure related to the breach. Moreover, defining the scope of antitrust damages would provide a guidance for victims to collect evidence to prove their harm for which they want to be compensated. On the other hand, a clear scope of antitrust damages would restrict the discretion of the courts, meanwhile improving the certainty of antitrust damages actions. For example, the amount of antitrust damages in *Huawei* case is completely determined by the discretion of the court.[385] The parties by no means predicted the judgment of the court.

The weakness in the legislation and the problem in practice on this issue render the definition of antitrust damages a necessary measure which needs to be taken to improve the effectiveness of Chinse antitrust damages mechanism.

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[384] *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.* First trial: shanghai Intermediate People's Court, (Minchuzi No. 169, (2010)) ((2010)沪一中民五(知)初字第 169 号); Appellate Court: Shanghai High People's Court,(Minsanzhongzi No. 63, (2012)) ((2012)沪高民三(知)终字第 63 号).

[385] In *Huawei* case, the competent Court, considering the nature of behaviour and the circumstances, including the degree of defendant's fault, the time period that the tortious behaviour lasted and the negative impact of the behaviour on Huawei, ruled that Huawei would get £2 million compensation from the defendant.

2.1.3.2 The reason for borrowing the EU experience in the definition of antitrust damages

As discussed in Chapter 2 on goals of an antitrust damages action, full compensation is the primary goal of private enforcement of EU competition law. This indicates that the main goal of the EU antitrust damages action is to compensate the harm rather than to deter the anti-competition infringement. This is because the antitrust damages action has been playing a complementary role to the public enforcement of EU competition law, for which the goal of deterrence has been established. In China, although the relevant legislation failed to articulate the compensatory goal of antitrust damages action, it is assumed from the attitude of the SPC[386] and the complementary role of antitrust damages action[387], that the primary goal of antitrust litigation is to compensate for the harm arising from anticompetitive behaviour, rather than to deter anti-competitive behaviour.

Moreover, punitive damages are not intended to be a feature of the current Chinese antitrust damages system. The EU Commission also holds the same position on the issue of punitive damages. In the EU, overcompensation is prohibited, i.e., through punitive damages or multiple damages.[388]

The similarity in the goal of antitrust damages action and the attitude towards exemplary damages between and EU and China provide a legal foundation for China to borrow EU experience in defining antitrust damages.

2.1.3.3 Legislative Recommendation

From the EU relevant legislation and leading cases,[389] full compensation has been established as the primary goal of antitrust damages actions in the EU. In pursuing this goal, the first and foremost consideration is the definition of scope of antitrust damages, including not only actual

[386] The Response of IP Tribunal of the SPC to the 2011 Consultation Paper of the Damages Judicial Interpretation, available at: http://www.court.gov.cn/zixun-xiangqing-2578.html, accessed in November 2017.
[387] For more discussion on compensation goal of antitrust damages action in China, please see: sec. 2 of Chapter 2.
[388] Directive 2014/104, OJ L 349/1.
[389] The leading EU cases include *Crehan* Case C-453/99 [2001], ECR I-6297; *Manfredi* Case C-259-298/04 [2006], ECR I-6619; and *Marshall* Case C-271/91 [1993], ECR I-4367.

loss, but also the loss in profit and interest on the damage.

Based on the above analysis on basic elements of antitrust damages in the EU and China's existing legislation and practice, it is recommended that the actual loss, loss of profits and the interest on damage should be legislated as essential components of antitrust damages in China.

According to relevant Chinese laws[390], the compensation for the *actual loss* is the minimum requirement of civil liability. The purpose of compensation is to recover the harm of victims as if the infringement had never happened.[391] Therefore, reparation for the *actual loss* should be an inherent requirement of the antitrust damages action in China.

Secondly, the profit is an increase in the value of an asset which would have happened but for the infringement, loss of which part should be compensated from the recovery perspective. Moreover, it is recognised that the *loss of profit* has been an integral part of antitrust damages in most jurisdictions of the EU.[392] The convergence of the competition policy all over the world suggests that the Chinese antitrust damages system could follow this tendency to make the loss of profit *an integral part* of antitrust damages in the AML legislation. As to the calculation of lost profit, *Ruibang*[393] case serves as a valuable lesson for the legislation, particularly for future cases involving vertical anticompetitive agreements. The court in *Ruibang* held the position that the loss of profit under the Contract law cannot be calculated as part of antitrust damages. The loss in profit based on the performance of anticompetitive agreement could not be compensated since this would lead to a misleading position that the profit arising from illegal agreement could be pursued through the judicial remedy. Instead, the Court observed that the loss in profit under the AML must be calculated according to the normal profit rate which is the profit rate in the relevant market without the anti-competitive agreement.

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390 For example, the general rules on civil liability of Chinese Civil Law, the Chinese Contract Law and the Chinese Tort Law.

391 Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013, para. 1.

392 Hanna Stakheyeva, 'Removing Obstacles to a More Effective Private Enforcement of Competition Law'(2012).E.C.L.R., 33(9), 398-405.

393 *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.*,first trial: shanghai Intermediate People's Court, (Minchuzi No. 169, (2010)) ((2010)沪一中民五(知)初字第 169 号); Appellate Court: Shanghai High People's Court (Minsanzhongzi No. 63, (2012)) ((2012)沪高民三(知)终字第 63 号).

Calculation of the lost profit is particularly significant for victims of certain types of anticompetitive behaviour, such as predatory pricing[394] and refusal to trade.[395] Unlike the cases involving the price increase, in such cases, for example, refusal to supply, the victims' actual loss is usually difficult to determine. In order to recover the lost business caused by such anticompetitive behaviour, it is necessary to evaluate antitrust damages in terms of lost profit. It could be calculated by means of econometric, finance and accounting methods.[396]

Finally, inclusion of *the loss of interest* into the scope of antitrust damages has been advanced on the basis of the 'effluxion of time'.[397] It is required by the full compensation principle that the awarded damages must be able to redress the harm arising from the lapse of time since it happened to the injured party.[398] Such kind of harm includes not only the depreciation of currency[399] but also the lost opportunity to control and employ the capital.[400]

In China, the situation is similar to the EU in that an infringement may have lasted for many years until it has been detected.[401] Besides, the parties in antitrust cases have to be prepared for legal proceeding to last a long time, from the launching of litigation to securing a final result in the case. Thus, it is fair and reasonable to take into account the time cost of victims, and to consider the loss of interest, as one of components of antitrust damages in China. It is also recommended that the calculation of lost interest, should be from the time that the harm occurred until the time when the damages is awarded, and the interest rate should be determined according to the compensatory nature of antitrust damages.

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394 Predatory pricing is a kind of dominance abusive behaviour. With the aim to exclude competitors outside of the relevant market, the undertakings with dominant position sell their products at below-cost price at the sacrifice of short-term profit. Article 17(2) of the AML prohibits the undertakings from selling products at prices below cost without valid justification.

395 Article 17(3) of the AML prohibits the undertaking's behaviour of refusal to deal with its trading partner without valid justification.

396 Commission, 'Staff Working Paper Annex to the Green Paper on Antitrust Damages Actions' SEC (2005) 1732, COM (2005) 672 final, para.140.

397 Directive 2014/104/EU of December 2014 on Antitrust Damages Actions, [2014] OJ L 349, 5 December 2014, para.12

398 Commission Staff Working Document, 'Practical Guide on quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013, para.20. Also see Case C-271/91 *M Helen Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I- 4367, [1993] 3 CMLR 293, 31; joined cases joined cases C-295/04 to C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619,97.

399 Case C-308/87 *Grifoni v European Atomic Energy Community* [1994] E.C.R. I-341, para.40. Also see opinion of Advocate General Tesauro, para.25.

400 EU Commission Staff Working Document, 'Practical Guide on quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013, para.20. Also see joined cases in C-104/89 and C-37/90 *Mulder and others v. Council and Commission* [2000] ECR I-203, Opinion of Advocate General Saggio, para.105.

401 Oxera, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', (December 2009), available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015, part iv.

However, it has to be accepted that the above three heads are only the basic scope of antitrust damages. In some extreme situation, for example, where anticipated losses have been caused by anticompetitive behaviour[402], the above basic heads of damages may not enough for full compensation, thus, some other elements, like anticipate losses need to be calculated into antitrust damages.

2.2 Types of Harm Caused by Anticompetitive Behaviour under the AML

2.2.3 Categories of Infringements Prohibited by the AML

Different types of anticompetitive behaviour may result into different types of harm. Before examining types of antitrust harm, it is necessary to look into different categories of the anticompetitive behaviour prohibited by the AML.

According to the AML, anticompetitive agreements are governed by Article 13[403] and Article14.[404] Specifically, Article 13 is designed to prohibit horizontal anticompetitive agreements. It prohibits the agreement between undertakings with competitive relationship, which has an effect of restricting competition. Horizontal agreements could take forms of price-fixing, quantity/sales-fixing, market-sharing, new tech-developing joint boycott. In the EU, such anti-competitive horizontal agreement is called "cartel".[405] Article 101 TFEU expressly prohibits the cartel infringement within the EU.

On the other hand, vertical anti-competitive agreements are governed by Article 14 of the AML. Article 14 prohibits the agreement made between the undertaking and its transaction parties.

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[402] Xiaoye Wang & Jessica Su, *Competition Law in China*, (2nd edn, Wolters Kluwer Law & Business 2014).

[403] Article 13 of the AML provides that undertakings with a competitive relationship are prohibited from entering into the following monopoly agreements: (1) fix or change the price of a product; (2) restrict the production quantity or sales quantity of a product; (3) allocate the sales market or the raw materials purchase market; (4)restrict the purchase of new technology or new equipment, or the development of new technology or new products; (5) joint boycott transactions; (6) other monopoly agreements as determined by the Antimonopoly Law Enforcement Authority under the State Council. Monopoly agreements referred to herein are agreements, decisions or other concerted conducts that eliminate or restrict competition.

[404] Article 14 of the AML provides that undertakings are prohibited from entering into the following monopoly agreements with their transaction counter-parties that: (1) fix the price of products resold to third parties; (2) restrict the minimum price of products resold to third parties; or (3) other monopoly agreements as determined by the AML Enforcement Authority under the State Council.

[405] Cartel is referred to as the agreement in which horizontal undertakings collectively fix higher prices.

The forms of vertical agreements identified in Article 14 mainly focus on fixing resale prices and setting minimum resale prices. Similarly, such vertical agreements are also prohibited by Article 101 TFEU.[406]

In addition to the prohibition of anti-competitive vertical and horizontal agreements, the AML also prohibits abuse of a dominant position. The prohibited abusive behaviour includes mainly the exploitative, exclusionary behaviour, tying and discriminatory transactions.[407] The analogous provision of EU competition law is Article 102 TFEU, which prohibits several categories of abusive conducts, including price exploitation, limiting production, price discrimination, tying and predatory pricing.[408]

Since the AML came into force in 2008, within the current legal framework, most of antitrust damages actions have been arisen from the abuse of dominance, for example, *QQ 360 v. Tencent*[409]*, Huawei v. Interdigital*.[410] A very limited number of cases has been filed concerning horizontal and vertical anti-competitive agreements during recent decade[411], *Ruibang v. Johnson & Johnson*[412] is an example of vertical anticompetitive agreements.

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406 Ibid. Although it fails to expressly distinguish between horizontal agreement and vertical agreement, all agreements between undertakings with effect of restrict or prevent competition in internal market are prohibited by 101 TFEU, the prohibition of which inherently include the vertical antitrust agreements with anti-competitive effects.

407 Article 17 of the AML states that undertakings with dominant market positions are prohibited from committing any of the following acts that abuse dominant market positions: (1)selling products at unfairly high prices or buying products at unfairly low prices; (2)without valid reasons, selling products at prices below costs; (3)without valid reasons, refusing to trade with trading partners; (4)without valid reasons, restricting trading partners to only trade with the undertaking or undertakings designated by the undertaking; (5)without valid reasons, tying products or imposing other unreasonable trading conditions during the deals; (6)without valid reasons, applying differentiated treatment with regards to transaction conditions such as trading prices to equivalent trading partners; (7)other abuses of dominant position determined by the AML Enforcement Authority under the State Council.

408 Text of Article102 of TFEU.

409 *Beijing Qihoo Technology Co. Ltd v. Tencent, Inc*, [2013] Supreme People's Court of China, Minsanzhongzi No.4(民三终字 第 4 号).

410 *Huawei Technologies Co. Ltd v. InterDigital Group*, first-instant trial court: Shenzhen Intellectual Property Court, (Minchuzi No.858(2011)); Appellate Court: Guangdong High People's Court, Minsanzhongzi No. 306 (2013).

411 See next section below, where this case is further considered.

412 *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson &Johnson Medical(Shanghai)Ltd., Johnson&Johnson Medical(China) Ltd.*, first-instance trial: shanghai Intermediate People's Court, [2010] (Minchuzi No. 169,) ((2010) 沪一中民五(知)初字第 169 号); Appellate Court: Shanghai High People's Court,(Minsanzhongzi No. 63, (2012)) ((2012)沪高民三(知)终字第 63 号).

2.2.4 Types of Harm Caused by Different Anticompetitive Behaviour

With respect to cartels, their main goal is to increase the selling price of cartel member's products or service. Among the wide variety of cartel agreements, the typical one is to collectively and directly fix unreasonably higher prices.[413] The direct harm caused by such kind of cartel is that the infringers' purchasers pay more money for the cartelised products than the price in the market without the cartel.

Besides the overcharging harm, according to economic theory[414], the price-fixing cartel also leads to the reduced volume in the relevant market, and further results in inefficiency of the economy. The difficulties in calculating antitrust damages of lost volume partly lie in the difficulty in identifying who are injured parties, particularly for the potential purchasers who would have bought the product at a competitive price. For direct purchasers, it is less difficult to calculate antitrust damages, as they could link the lost-volume harm to the reduction of their own sales in the downstream market.

From an economic perspective, in addition to direct effects of overcharging and reduced volume, cartels are also likely to have other negative effects on cost levels, quality and choice.[415] Theoretically, victims are entitled to compensation for all harm caused by cartels. However, in practice, compared with the direct harm caused by overcharge, it is very difficult to prove and calculate these indirect harms. Moreover, it is rare to see such victims suffering, like in reduced choice cases, and hence filing the antitrust damages litigation.

As regards vertical agreements, there have been relatively few cases brought before Chinese

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[413] Oxera, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', (December 2009) sec. 2.2.1< http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015,

[414] According to the antitrust harm analysis provided by the Oxera report, economic theory regards the lost-volume effect as a deadweight welfare loss. Economists observed that the lost-volume effect would lead to inefficiency because the cartel undertakings fail to trade with those purchasers who would be willing to buy the products or service under a competitive price.

[415] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law', in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives*, (ZEW Centre for European Economic Research 2014) 127.

courts. It is therefore noteworthy to look into the harm caused in the *Ruibang* case[416], where the resale price maintenance agreement was made, which is a type of the vertical anticompetitive agreement. The High Court affirmed the anticompetitive effect of the resale price maintenance agreement in the distribution contract reached between Ruibang and Johnson & Johnson. On the one hand, the resale price maintenance agreement had eliminated the intra-brand competition and thus enabled the defendant to maintain a high price to sell the product, which led to the overcharging, as the harm caused by the price-fixing cartel discussed above. On the other hand, the distributor's pricing freedom was restricted, and other more efficient distributors were excluded from the relevant market. The harm caused by the exclusionary effect is similar to that of the exclusionary abuse of dominance.

With respect to the harm caused by exclusionary conducts, Article 17 of the AML[417]provides that, exclusionary abuse of dominance could take forms of refusal to trade, predatory pricing, exclusive dealing, tying and other exclusionary abusive behaviour determined by the Anti-Monopoly Enforcement Authority under the State Council (AMEA). These forms of exclusionary abuse are similar to the proposition of the European Commission on enforcement priority of Article 102 TFEU. The Commission highlighted several forms of the abusive behaviour with exclusionary effect, such as the exclusive dealing, tying and bundling, predation, refusal to supply and margin squeeze.[418] Thus, the similarity in types of the exclusionary abusive behaviour provided by the AML and the EU makes it possible that the analysis on the harm caused by these conducts, undertaken by the EU Commission and the courts of the Member States can be referred to by China's courts so as to award a proper amount of antitrust damages in such cases.

The exclusionary effect of abusive behaviour and anticompetitive agreement could cause harm to competitors and buyers. The buyers include not only direct purchasers, but also end-

[416] *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson&Johnson Medical(Shanghai)Ltd*., Johnson&Johnson Medical(China) Ltd., first-instance trial: shanghai Intermediate People's Court, [2010] (Minchuzi No. 169) ((2010) 沪一中民五(知)初字第 169 号); Appellate Court: Shanghai High People's Court [2012],(Minsanzhongzi No. 63) ((2012)沪高民三(知)终字第 63 号).

[417] Article 17 (3), (4), (5) of the AML fall within the exclusionary abuse of dominance.

[418] Commission Communication Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C-45/7.

consumers; not only existing purchasers, but also potential purchasers. They are probably harmed by the exclusionary conduct, in forms of higher price, lost profits, and reduced quality or chance. However, the harmed purchasers may not always be able to prove their harm. For example, in *Antena 3 Television SA* case[419], Antena 3 alleged that it lost its profits in relation to advertising income which it could have obtained from broadcasting football matches in Spain. But the Madrid Court of Appeal overturned its claims, holding that the proof of such loss is untenable from a practical perspective.

Whereas, the harm to competitors, arising from exclusionary conducts, could be in the form of increased costs or reduced revenue, it is worth noting that the reduction of profit in an economic sense is different from the lost profit from a legal perspective.[420] In an antitrust damages litigation, the harm has to be ascertained as to whether it belongs to actual loss or lost profit, because they have different evidential requirements. For example, in *Forbruger-Kontakt a-s v. Post Danmark A/S*, the claimant, following the Danish Competition Commission's infringement decision that the Post Danmark had abused its dominant position in the unaddressed mail market by discriminatory pricing and rebates from January 2004 until June 2005, brought a damages litigation before the Eastern High Court of Denmark, alleging that it lost three major customers to the defendant and one-third of its turnover. The Court found that the claimant's harm occurred not only between January 2004 and June 2005, but also the after June 2005, since the claimant was very unlikely to recall the lost customers due to the defendant's abusive behaviour.[421]

In addition, there are other types of harm caused to competitors. Take a French case as an example, in *S.A.Mors v. S.A.Labinal*[422], the French Court found that the defendant entered into an anti-competitive agreement and abused its dominant position with the aim to eliminate its competitor, Mors. According to the analysis of the expert appointed by the Court, the claimant

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[419] *Antenna 3 Tlevision SA v. Liga Nacional de Futbol Profesional*, the judgment of first instance was overturned by the Madrid Court of Appeal on 18th December 2006.

[420] Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers, (*1st edn, Oxford University Press 2011) 509.

[421] *Forbruger-Kontakt a-s v. Post Danmark A/S*, 20th May 2009, Eastern High Court of Denmark. Also see: Oxera, 'Quantifying antitrust damages—towards non-binding guidance for courts', (December 2009) Box 2.2, available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015.

[422] *S.A. Mors v. S.A. Labinal*, 30th December 1998 Paris Court of Appeal. Also see: Oxera study, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', Box 2.3.

had suffered the harm including additional administrative and commercial costs, loss of opportunity to join other tenders as well as the inability to recover one-off costs. The Court calculated antitrust damages simply based on the report of expert, failing to consider the damages for the loss of opportunity to enter other similar markets.

Although the exclusionary abuse of dominance may take various forms, types of harm caused by such behaviour are similar for the purpose of claiming antitrust damages in the litigation. As for competitors, as shown in *Forbruger-Kontakt a-s*[423] and *S.A.Mors*[424] cases, they would not be able to compete effectively in the market, sometimes even be forced to exit the market, or would be prevented from entering the market. The harm caused by such behaviour to competitors not only include the actual loss, such as the extra costs for administration, but also the lost profits, expressed as the lost opportunity to enter new contract or enter other markets.

The harm caused by a vertical agreement with exclusionary effect is also diversified. In the milestone *Crehan* case[425], the claimant sought to claim compensation for not only the actual loss, but also the future profit he would have made in the absence of the vertical anticompetitive agreement, as well as the value of lease in 2003 if free of a tie. In this case, if the liability were established, the claimant would be entitled to full compensation of the harm, on which point the High Court and the Court of Appeal has agreed, though the Court of Appeal took a restrictive attitude on the future profit that the claimant would have made but for the anticompetitive agreement. The Court of Appeal refused to estimate future profits as it is estimated from a hypothetical business. Instead, the Court only accepted the real value of asset in 1993 when Mr Crehan gave up the possession of Cock Inn and Phoenix.[426]

Besides exclusionary conducts, the abuse of dominance may have exploitative effect, normally in forms of excessive price and discriminatory pricing.[427] Thus exploitative abuse would function in the same way as that of cartels, through raising price and reducing quantity.

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[423] *Forbruger-Kontakt a-s v. Post Danmark A/S*, 20th May 2009, Eastern High Court of Denmark.
[424] *S.A. Mors v. S.A. Labinal*, 30th December 1998 Paris Court of Appeal.
[425] *Crehan v Inntrepreneur Pub Co (CPC)*, CH 1998 C801 [2003] EWHC 1510(Ch).
[426] *Crehan v Inntrepreneur Pub Co (CPC)*, [2004] EWCA Civ 637, para.172-182.
[427] Article 17(1), (2), (6) of the AML provide the exploitative abusive practices, for example, selling products at unfairly high prices or buying products at unfairly low price; selling products at prices below cost; according differentiated treatment in regard to transaction conditions such as prices to equivalent trading partners.

Therefore, the same types of harm would be caused as in cartel cases. As discussed previously on the harm of cartels, the harm of exploitative abuse is the overcharging harm due to a higher price paid by the purchasers further down the supply chain, and the lost volume caused by reduction in quantity triggered by higher price. In terms of quantifying damages in exploitative abuse cases, compared to cartel cases, it is more difficult to identify a proper benchmark price level for dominant undertakings as even the counterfactual market may not be fully competitive because of some other factors, like high barrier to entry and strong scale economy.[428] This might be one of reasons that very few exploitative cases are brought in the EU and even no such case has been found in the Chinese courts.

2.3 Economic Methods and Techniques for Quantifying Antitrust Damages

Within the existing antitrust legal framework of China, there has not been any legislation or non-binding guidance as to specific methods of quantifying the amount of antitrust damages. The lack of specific guidance on the quantification methods has led to uncertainty of application of antitrust damages provisions in China, and thus underdevelopment of private enforcement of the AML. Whereas, the EU Commission, based on the Oxera Study in 2008 and its relevant experience, issued a practical guide on how to quantify antitrust damages.[429] As one of EU measures facilitating antitrust damages actions, the provision of specific quantifying methods has to a certain extent reduced ambiguity and arbitrariness in awarding antitrust damages. In the EU, since these quantifying methods are completely a technical issue rather than a political policy choice, the 2013 EU Guide could be a good paradigm for providing guidance for Chinese courts and parties to quantify antitrust damages.

The quantification of antitrust damages needs to strike a balance between two ends. The first is to get the amount of antitrust damages as precise as possible, which is the real value of losses derived from infringements. Second, methods of quantification are easy to apply and are

[428] Oxera, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', (December 2009) sec. 2.2.2, available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015.
[429] EU Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013.

consistent with the existing legal system.[430]

As for the *calculation of antitrust damages*, no matter whether the infringement results from the operation of a cartel agreement or abusive conduct, the basic conceptual framework is comparing the real situation where the infringement actually happens, with the hypothetical counterfactual situation in the absence of infringement. Simply speaking, antitrust damages should be the difference in the value of assets of the business operator in such two situations.[431]

Therefore, specifically, antitrust damages quantification includes two main stages. The first stage is determination of the counterfactual scenario, which is, what would have happened to the claimant where the infringement had not taken place; the second is to decide a final value of antitrust damages in the factual world compared to the counterfactual world.[432] The major difficulties and controversies on the quantification of antitrust damages concentrate on the first stage where complex economic and financial analysis models are used.

Since the complete data does not exist in the "real world", one has to determine the counterfactual situation by means of models containing simplified assumptions. Here, the models, from the perspective of economics, refer to any abstract projection of a counterfactual scenario. The aim of using the model is to produce an estimate of what would have happened 'but for' the infringement[433], namely the counterfactual scenario. The following table summarises different methods and models of quantifying antitrust damages.

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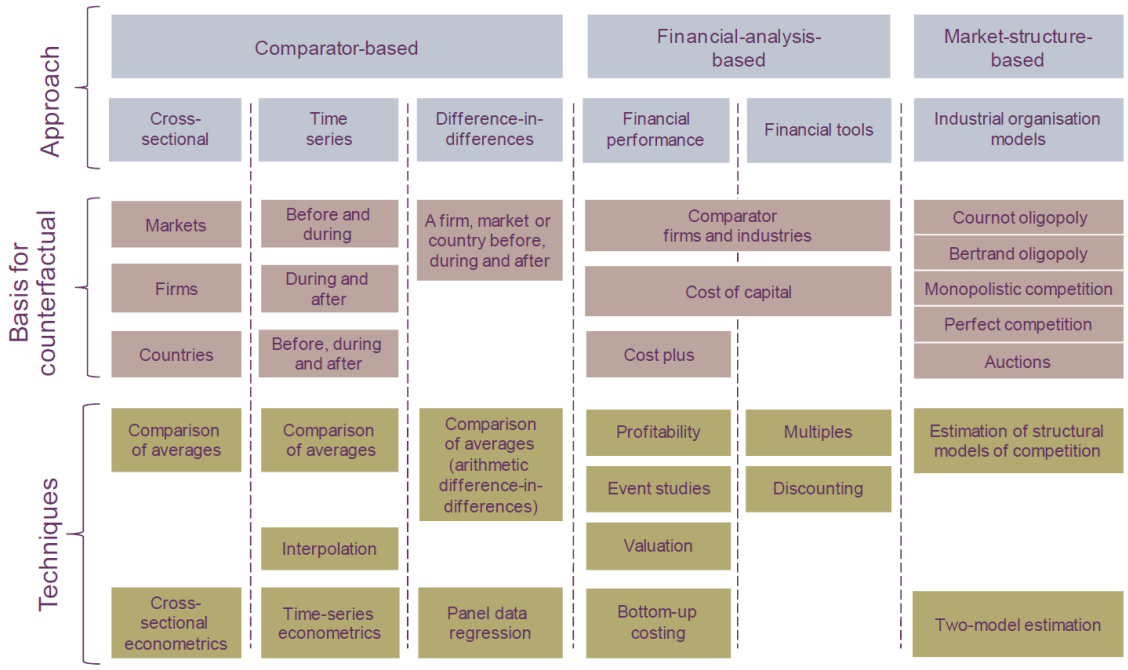
[430] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 124.

[431] Frank Maier-Rigaud & Ulrich Schwalbe, 'Quantification of Antitrust Damages', (Document of LEM), available at: <http://lem.icl-lille.fr/LinkClick.aspx?fileticket=icOQRDAd5ns%3D&tabid=1198&language=fr-FR> accessed 11-2015 p.29.

[432] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 125.

[433] Ibid, 124.

Table: Classification of methods and models[434]



Source: Oxera

A wide variety of methods and models have been categorised by the economic and financial theory into three broad groups. As we can see from the above table, at the first level of approach, the methods are broadly classified into comparator-based, financial-analysis based and market-structure based which respectively has its own sub-approaches. At the second level of basis for counterfactual, basic elements for determination of the counterfactual in each approach are identified. The third level sums up techniques applied to estimate the value of antitrust damages for each approach.[435]

Comparison is the primary method used by economists to estimate antitrust damages. This method uses data from sources that are external to the infringement, in order to estimate the counterfactual. This can be done in three different ways: cross-sectional comparisons (comparing different geographical or product markets); time-series comparisons (analysing prices before, during and/or after an infringement); and a combination of the above two in "difference-in-difference" models (for example, analysing the change in price for a cartelised

[434] Oxera, 'Quantifying antitrust damages—towards non-binding guidance for courts', available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015, figure 3.1.
[435] Ibid., p.v.

market over time, and comparing that against the change in price in a non-cartelised market over the same timeframe). Various techniques can be used to analyse this comparator data, ranging from the simple comparing averages, to complicated panel data regression.[436]

With comparator-based approaches, the counterfactual is estimated by using the data from the market or a specific time period which are not affected by the infringement. This model assumes that all the observed differences between the factual and counterfactual are resulted from the specific infringement. This assumption completely ignores the other factors that may cause the price difference in the counterfactual market, which constitutes a disadvantage of the comparator-based approach. One solution to this problem is to introduce additional explanatory factors into the model, so as to mitigate the biasing effect caused by this assumption.[437] In such scenario, the regression technique could be a useful method to control for other differentiating factors between the real word affected by the infringement, and the comparator market or period. [438]

In addition to the above-mentioned comparison method, financial-analysis-based approaches, which have been developed in finance theory and practice, could also be employed to estimate the "but-for" situation. They use financial information on comparator companies and industries, benchmarks for rates of return and cost information on defendants and claimants to estimate the counterfactual. There are two types of approaches that use this information. The first type is aimed to examine financial performance, including assessment of profitability of defendants or claimants then comparing this against a benchmark, and event studies of how stock markets react to information. The second is a group of more general financial tools, such as discounting and multiples, which can be used alongside other categories of methods and models.[439]

Besides the comparison and financial analysis, the counterfactual could also be determined by

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[436] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 128.
[437] Ibid, 131.
[438] Regression techniques are statistical methods that can be used to explain the variation in a piece of data using other factors. Among the different possible models, ordinary least squares (OLS) regression is widely used for such purposes.
[439] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 128.

means of structural approach. Market-structure-based approaches are derived from industrial organisation (IO) theory[440] and use a combination of theoretical models, assumptions and empirical estimation (rather than comparisons across markets or over time) to arrive at an assessment of the counterfactual. These approaches involve identifying models of competition that best fit the relevant market, then using them to provide insight into how competition works in the market concerned and to estimate prices or volumes in the absence of anti-competitive conduct.[441]

Regarding the choice of method, there is no single method which is optimal. We can only select the most appropriate method for a specific case. In principle, each of these approaches can be used to quantify antitrust damages for any type of anticompetitive infringements, for example, cartels, abuse of dominance and restrictive agreements. Therefore, the choice of method depends on details of the case, particularly on the availability of information and data, the structure of market in question, even on the level of evidence and burden of proof in the relevant legal framework.[442] Moreover, these methods are not mutually exclusive and in fact often complement each other. In some situations, combination of more than two techniques and methods could be used in one case.[443]

Taking exclusionary abuse as an example, the use of time series comparator-based method would cause serious problem in such cases. Since the exclusionary strategy tends to change the market structure, the comparison with the period before introduction of the exclusionary strategy would not provide proper price difference. In this situation, a question would arise as to how the market in question would have developed in the absence of exclusionary conduct.[444]

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[440] Industrial organization theory is concerned with how markets works, how demand and supply interact, how rivals react strategically to each other's actions. IO theory has developed a range of models of competitive interaction and firm behaviour that predict a variety of outcomes, ranging from the least competitive (monopoly) to the most competitive (perfect competition).

[441] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 129.

[442] Juan Delgado & Eduardo Perez-Asenjo, 'Economic Evidence in Private Enforcement of Competition Law in Spain', (2011) E.C.L.R., 32(10), 507-512.

[443] Oxera, 'Quantifying Antitrust Damages—Towards Non-binding Guidance for Courts', available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015, p.v.

[444] Frank Maier-Rigaud & Ulrich Schwalbe, 'Quantification of Antitrust Damages', (Document of LEM), available at: <http://lem.icl-lille.fr/LinkClick.aspx?fileticket=icOQRDAd5ns%3D&tabid=1198&language=fr-FR> accessed 11-2015, p.31.

In the past decade, most of antitrust damages cases brought before the Chinese courts are due to the abuse of dominant position in the market. The quantification of antitrust damages in abuse of dominance cases is usually more difficult than that in cartel cases. In exploitative abuse cases where the dominant company charge an unreasonably high price, the time series and cross-section comparison can be employed.

During the process of estimation of the antitrust damages using the above-mentioned methods, factors, other than anti-competitive behaviour, which are at work in the market in question and are likely to affect the estimation of the amount of antitrust damages, should be taken into account. It is assumed that the demand and cost side facts could affect the appropriate quantification of antitrust damages, such as the complementary products, imperfect substitute products, sales and dynamics in demand, search costs/market frictions, network effect dynamics, learning curve dynamics capacity constraints, and the shape of the cost function and fixed costs.[445]

Indeed, the economic methods and techniques summarised by the EU Commission could offer valuable assistance for China's courts and parties of the antitrust damages cases so as to enhance the degree of precision and certainty in terms of the antitrust damages quantification. However, in the absence of evidence or reliable information, the Chinese antitrust courts tended to obtain an approximate estimate on the amount of compensation based on *equitable considerations*, such as reasonability and fairness, because the use of these economic methods is subject to availability of reliable data, in other words, the accessibility of evidence.

Some of the EU Member States have experience of dealing with the situation of lack of reliable information. In such situation, judges are granted a certain degree of freedom to estimate antitrust damages, where the use of such quantification methods proves to be difficult or impossible. The rules governing such estimation in these Member States are principles, such as equity, justice and efficiency of procedure.[446] For instance, Germany has a rule providing

[445] Peter Davis, 'Facts and the Estimation of Damages in Competition Cases', (2012) E.C.L.R., 33(8), 339-346.
[446] Gunnar Niels & Robin Noble, 'Quantifying Antitrust Damages—Economics and the Law' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 124.

the court with certain discretion in terms of estimating the amount of losses by evaluating all relevant details of particular cases and on the basis of its best judgment.[447] Another example is a ruling of Italian Supreme Court in a car insurance cartel case, which affirmed that an equitable amount of antitrust damages is acceptable in Italian courts when it is difficult or impossible to prove the exact value of actual losses for the claimant.[448]

3 The Relationship between Antitrust Damages and Fines

During the last decades, the enforcement of the AML has been characterised by two trends: on the one hand, there has been a significant increase of fines imposed by the AMEA for anti-competitive infringements; on the other hand, the private enforcement has been strengthened since the 2012 Judicial Interpretation came into force. The annual number of antitrust damages cases has been rising from only 10 cases in 2008, to 127 cases in 2017.[449] The existing antitrust legal framework is restricted to dealing with private and public enforcement separately, while the interaction of them, in particular, the fines and antitrust damages, remains unaddressed by relevant legislation. This section will focus on the potential impact of fines imposed by competition authorities on the calculation of antitrust damages so as to improve the effectiveness of antitrust litigation in China.

3.1 The Context of Interaction between Private Enforcement and Public Enforcement of the AML

In order to find out how the calculation of fines impacts the calculation of antitrust damages, it is necessary to have an overall observation as to the relationship between *private enforcement* and *public enforcement* of the AML.

In China, historically, competition policy has been enforced mainly through administrative proceedings by three administrative agencies, namely the NDRC, SAIC and MOFCOM.[450]

[447] Section 287 of the German Code of Civil Procedure.
[448] *Fondiaria SAI SpA v. Nigriello*, Italian Supreme Court, 17 February 2007. The Supreme Court resorted to Article 1226 of the Italian Civil Code in its ruling.
[449] See Graph on changes in the number of cases before court since entry into force of the AML in the Introduction section of this Chapter.
[450] See f.n.37.

With the increasingly number of antitrust litigation brought before Chinese courts, a Judicial Interpretation on antitrust damages litigation was issued in 2012. Since then, the dual-track enforcement mechanism of the AML has been established in China.

However, the 2012 Judicial Interpretation only provides some basic rules on certain issues in the antitrust litigation, such as allocation of jurisdiction on antitrust damages cases, burden of proof and limitation period. Many significant issues remain unaddressed in the 2012 Judicial Interpretation. Although three antitrust enforcement agencies have promulgated a great deal of regulations to enforce their own enforcing authorities, private enforcement is still underdeveloped.[451] This could partially explain why public enforcement (by administrative agencies) prevails over private enforcement by the courts in China. Private enforcement has only been playing a complementary role in the AML enforcement mechanism.

In the EU, enforcement of competition law similarly relies on the administrative proceedings of competition authorities and civil proceedings before the courts. These two enforcement schemes complement with each other. Importantly, over the last decade, the Commission has issued many measures to facilitate private enforcement of EU competition law. Among these measures, some are designed to protect effectiveness of public enforcement, particularly the leniency program, on which China should take measures to further deepening the reform of China's antitrust damages litigation system.

Another reason for referring to EU's relevant measures is the similarity in terms of the objectives of the public enforcement and private enforcement. The main duty of competition authorities is to protect competition in the market by deterring and punishing competition infringers through fines and other penalties provided by law.[452] So the goal of public enforcement is *to deter anticompetitive infringers*. In China, the AML enforcement agencies have begun to pursue a high-fine policy. It is believed that this has further enhanced deterrence goal of public enforcement in China.

[451] According to relevant statistics, until 2012 the number of regulations published is 7, 11,5 and 2 respectively by State Council, MOFCOM, SAIC and NDRC.
[452] Hanna Stakheyeva, 'Removing Obstacles to a More Effective Private Enforcement of Competition Law', (2012) E.C.L.R.,33(9), 398-405.

Whereas the goal of private enforcement through the antitrust damages proceeding, as discussed in Chapter 2, is *to compensate victims* of the anticompetitive infringement. It is believed that, even so, the effective measures provided by private enforcement also contribute an inherent deterrent effect on future anticompetitive behaviour.[453]

With respect to the interaction between public enforcement and private enforcement, it is believed that effective private enforcement assists public enforcement in terms of protecting competition and deterring anticompetitive infringers. Public enforcement, in turn, could enhance the effectiveness of private enforcement through cooperation between competition authorities and national courts, as competition authorities have wide investigation powers and experienced economic expert panels. Specifically, the court could rely on the infringement decision of competition authorities as a reliable evidence in follow-on actions to determine the type of anticompetitive behaviour, duration of the infringement and the effect on market competition. For instance, in UK and Germany, the competition authorities' decisions have binding effect in the courts. Therefore, it is believed that the cooperation between the courts and competition authorities helps to strength the effectiveness of private enforcement and increase the quality of rulings of the courts in antitrust damages actions.[454]

3.2 The Interaction between Antitrust Damages and Fines

One important aspect of the relationship between public enforcement and private enforcement is to reconcile the leniency program and quantification of antitrust damages. In the existing Chinese legislation on antitrust damages litigation, this sensitive and sophisticated issue has not been touched yet. The core of the issue lies in the balance to be stroke between facilitation of antitrust damages litigation and the effectiveness of leniency program. To deal with this issue, it is assumed that the solution lies in a proper mechanism for the estimation of antitrust damages.

Accordingly, in determining the amount of antitrust damages, it has raised a question as to whether and the extent to which the court should take into account the fines previously imposed

[453] Commission Communication on Quantifying Harm in Antitrust Damages Actions, OJ C 167/19, 2013/C 167/07.
[454] Hanna Stakheyeva, 'Removing Obstacles to a More Effective Private Enforcement of Competition Law', (2012) E.C.L.R.33(9),398-405.

by competition authorities. For example, in a *LED screen* case[455], the NDRC launched an investigation into the manufacturers of LED screen engaging in horizontal anticompetitive agreement in 2013. The NDRC's sanction decision included three parts: 1. Return RMB172million to the victim manufacturers of TV set; 2. Confiscate illegal gains of RMB 36.75 million; 3. Impose fines of RMB 144 million. It is clear that the above sanction included the returning of illegal gains arising from the overcharge imposed on victim manufacturers of the TV set. Although the decision was made in pursuant to the Price Law[456], the AML has also empowered competition authorities to confiscate illegal gains of infringers.[457] The recovery principle[458], followed by Chinese civil proceedings, therefore give rise to a question: under the circumstance that a certain amount of illegal gains has been returned to victims by means of sanction decision from competition authorities, does it mean that manufacturers of TV set already have no harm suffered, accordingly the requirement of injury would not be satisfied? Since it is generally believed in China that the administrative punishment and civil compensation have different objectives, the anti-competitive behaviour should be sanctioned by competition authorities, without prejudice to the right of victims to compensation for the same infringement. However, it seems to be contrary to the recovery principle of civil proceedings if the fact that the manufacturers of TV set has been redressed through administrative punishment would not be taken into account. The AML remains silent as to how to deal with this issue.

The antitrust litigation rules in China allow for both stand-out and follow-on actions. A plaintiff may bring an action directly before the courts, or after competition authorities have adopted its decision concerning particular anti-competitive conduct.[459] However, the antitrust litigation rules do not address potential negative interaction between competent court and competition authorities, specifically, the damages award in the follow-on action undermining the

[455] NDRC antitrust decision on manufacturers of LED screen,(news.cn, January 2013), available at: < http://news.xinhuanet.com/finance/2013-01/05/c_124187534.htm> accessed 15 December, 2015.
[456] Specifically, the decision is made under Article 14 of the Price Law.
[457] Article 47 of the AML.
[458] Ning fengxuan & Peng Heyue,'Dura-track of the Enforcement of the Antimonopoly Law of China' (King & Wood Mallesons, September 2013), available at:
< http://www.chinalawinsight.com/2013/09/articles/corporate/antitrust-competition/> accessed 12 December 2015.
[459] Article 2 of the 2012 Judicial Interpretation.

effectiveness of previous leniency program.

In the EU, the interaction between fines imposed by competition authorities and antitrust punitive damages awarded by the national courts is based on the *non bis in idem* principle[460], which usually takes the form of set-off mechanism.[461] This principle would require the decision-maker in the later proceeding to take account of the prior procedure.[462] It is believed that this principle requires harmonisation of fines imposed on an infringer and antitrust damages against it, particularly with punitive nature.[463]

As far as antitrust punitive damages are concerned, Directive 2014 imposes no absolute ban on it, only stating that antitrust damages must not lead to overcompensation by means of multiple or punitive damages.[464] This indicates that the States could lay down provisions on antitrust punitive damages, as long as it would not lead to overcompensation, in compliance with the principle of equivalence.[465] For example, in the UK, punitive damages are available in its damages system. But the English courts are cautious about its application on follow-on antitrust damages actions. The English High Court, in *Devenish*, has declared this proposition, holding that the Community principle of *non bis in idem* would preclude the award of punitive damages of the defendants had already been fined by the European Community.[466] After this case, it has been universally accepted that antitrust punitive damages would not be available for follow-on actions in the UK.[467] However, the CAT in *Albion* made it clear that the exemplary damages could still be available for other antitrust damages cases, for instance, the cases without prior competition authorities decisions involved.[468]

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460 *Devenish Nutrition Ltd v. Sanofi- Aventis SA* [2007] EWHC 2394(Ch); also see: Lianos I., Davis P.& Nebbia P., *Damages Claims for the Infringement of EU Competition Law*, (OUP 2015) 38.

461 Thorsten Mager & Thomas B. Paul, 'The Interaction of Public and Private Enforcement- The Calculation and Reconciliation of Fines and Damages in Europe and Germany', in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives*, (ZEW Centre for European Economic Research 2014) 94.

462 Ibid., 97.

463 Ibid., 94.

464 Directive 2014/104, OJ L 349/1, para. (13).

465 Directive 2014/104, OJ L 349/1, Art. 4.

466 *Devenish Nutrition Ltd. &Ors v. Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch), Paras. 40-55

467 Thorsten Mager & Thomas B. Paul, 'The Interaction of Public and Private Enforcement- The Calculation and Reconciliation of Fines and Damages in Europe and Germany', in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives*, (ZEW Centre for European Economic Research 2014) 95.

468 *Albion Water Ltd. v. DWR Cymru Cyfyngedig* [2010] CAT 30. Also see Thorsten Mager & Thomas B. Paul, 'The Interaction of Public and Private Enforcement- The Calculation and Reconciliation of Fines and Damages in Europe and

The AML and its 2012 Judicial Interpretation have not taken any position regarding antitrust punitive damages. In the general civil damages system of China, punitive damages are not allowed, with an exception of the product liability imposed by the Consumer Protection Law 2013 on manufacturers.[469] Due to the primary goal of antitrust damages, that is, the full compensation, as well as the concern of over-deterrence, the thesis is arguing that punitive damages should not be generally available for antitrust damages claimants, with the exception that, when it is practically difficult to calculate the actual total losses based on the available evidence, antitrust multiple damages can be allowed to be calculated based on the direct losses.

It is assumed that the second important objective of Directive 2014 is to improve the interaction between private and public enforcement of EU competition law.[470] Optimal interaction between these two means of enforcement will lead to optimal overall enforcement of EU competition rules. In order to prevent possible negative interaction between them, Directive 2014 introduces rules to ensure that the enhanced private enforcement would not undermine the effectiveness of public enforcement.

One set of rules is to limit joint and several liability of the leniency applicant from the perspective of interaction between fines and damages. Normally, joint and several liability means than victims can obtain full compensation from each infringer, and the infringer can then claim contribution from each other. However, Directive 2014 provides that the immunity recipients are joint and several liable only for their own direct and indirect customers. The purpose of this measure is not to completely free the immunity recipient from civil liability, but only to prevent the immunity recipient from suffering worse liability more than other conspirators, so as to protect the effectiveness of leniency program. Because the immunity recipient is not likely to appeal the infringement decision, it is generally the first party against whom the decision becomes final. This creates a risk of the immunity recipient becoming the first target of antitrust damages litigation. This risk could be a major disincentive for infringers

Germany' in Kai Huschelrath & Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives* (ZEW Centre for European Economic Research 2014) 100.

[469] The customers injured by defective product have right to punitive damages, for example, double damages, as provided by Article 55 of the Consumer Protection Law 2013.

[470] European Commission Competition Policy Brief, 'The damages Directive—Towards more effective enforcement of the EU competition rules', Issue 2015-1, January 2015.

to apply for leniency to receive the immunity from fines.[471]

Under the AML, the leniency program has been in place in China since 2008. Under this program, the infringer who reports its anticompetitive conduct and provides relevant evidence to competition authorities, could be granted with reduced fines or an exemption from fines. The specific enforcement authorities, for example, the NDRC and SAIC, already laid down their own regulations to enforce the leniency program.[472] This program has been playing a significant role in detecting anticompetitive behaviour in China. Furthermore, it has been extended from the horizontal to vertical anticompetitive behaviour by NDRC.

The AML and its Judicial Interpretation 2012 failed to provide any mechanism to balance the liability of fines and liability of damages, so as to protect the effectiveness of the leniency program. It is predicted that the lack of balancing mechanism would to some extent prohibit the potential leniency applicant from reporting and providing evidence on their anticompetitive conduct. To achieve a more effective leniency program, it is proposed that further measures other than immunity from fines should be taken to encourage more leniency application. In view of the complementary relationship between public enforcement and private enforcement, limitation of joint and several liabilities of the immunity recipient in the subsequent antitrust follow-on damages action to paying damages to its direct and indirect customers is an appropriate way to encourage more leniency applications. Because immunity recipients are very likely to be the primary target of the antitrust damages litigation and have few chance to appeal.

On the other hand, since full compensation is the primary goal of private enforcement of the AML, under the circumstance that the victims are by no means get full compensation from the other non-leniency infringers, the immunity recipient remain the last resort to be responsible for the rest of compensation.[473] Thus the recovery principle of the civil liability would not be

[471] Ibid.

[472] Relevant regulation of NDRC: the first of the undertakings which report its price monopoly agreement to the NDRC and provide material evidence could have immunity from fines. The second one may be granted reduced fines at the rate of no less than 50%. Other reporters could enjoy reduced fine at the rate of no more than 50%. Relevant regulation of SAIC: it is similar to that of NDRC. Furthermore, it does not apply to the organizer of the monopoly agreement.

[473] Stephen Wisking, Kim Dietzel & Molly Herron, 'European Commission Finally Published Measures to Facilitate Competition Law Private Actions in the European Union', (2014) E.C.L.R.35(4), 185-193.

undermined by the leniency program.

4 Conclusion

The quantification of antitrust damages is one of key elements of achieving the full compensation goal of private enforcement of the AML. The existing ambiguous provisions and gaps in the legislation regarding the antitrust damages quantification has greatly undermined the goal of full compensation pursued by the antitrust damages action. As discussed in Chapter 2, full compensation is the primary direct goal of the AML damages litigation, though it is not explicitly expressed by the AML and its 2012 Judicial Interpretation. Moreover, the recent antitrust damages cases in China also set an inherent requirement of full compensation, which is consistent with the main goal of the EU antitrust damages action. Since the common primary objective of full compensation pursued by the antitrust damages action between the EU and China, the measures recently advanced by the EU concerning the quantification of the antitrust damages would be of reference value for China to improve the antitrust damages quantification mechanism.

First of all, the scope of antitrust damages should be defined in the legislation. As provided by Directive 2014[474] and confirmed by relevant CJEU case law[475], three elements, including *the actual loss, loss in profit and the interest on damage*, have to be included in antitrust damages award. In considering the scope of antitrust damages, the Chinese legislature should pay more attention to the three essential elements, particularly the loss in profit and interest on damage. The quantification of the loss in profit was examined by the EU Court on the case-by-case basis. In China, the courts tend to rely on the Contract Law and Tort Law when estimating antitrust damages. In view of the complexity of antitrust cases, it is suggested that the Supreme People's Court of China should issue a judicial interpretation and publish guiding cases to further clarify the quantification of loss in profit based on the distinction between the tort-based antitrust cases and contract-based antitrust cases.

As for the calculation of interest on damage, it is also an essential component of antitrust

[474] Directive 2014/104/EU of December 2014 on Antitrust Damages Actions, [2014] OJ L 349/1, 5 December 2014.
[475] Court rulings in *Manfredi* Case C-259-298/04 [2006], ECR I-6619*; Crehan* Case C-453/99 [2001], ECR I-6297; and *Marshall* Case C-271/91 [1993], ECR I-4367.

damages, considering the effluxion of time. When determining the interest on damage, it is important to set the interest rate, and the time point from when the interest is calculated. It is noted that a high interest rate would risk leading to the unjust enrichment, making the compensation punitive. This is contrary to the compensatory nature of antitrust damages. On the other hand, overcompensation might have an over-deterrence effect on the anti-competitive behaviour. Therefore, the determination of interest on antitrust damages is an area in which the antitrust damages action is likely to achieve deterrence, which is overlapped with the goal of public enforcement. Although the deterrence is not the primary goal of antitrust damages action in China, it could be a side-effect of private enforcement of the AML, and the level of deterrence could be adjusted through the adjustment of interest rate.

Second, antitrust damages action is one of enforcement methods of the AML, in order to achieve optimal enforcement of the AML, appropriate mechanism in the antitrust damages action should be taken to protect the effectiveness of public enforcement, at the same time, to achieve the goal of antitrust damages litigation. Specifically, in determining the amount of antitrust damages award, the limitation on joint and several liabilities of the immunity recipient is a very effective measure to protect the outcome of public enforcement without prejudice to the effective operation of antitrust damages action. Under such arrangement, leniency recipients only take limited joint and several liabilities, which means that they take joint and several liabilities only for their own customers. This measure has an effect on follow-on actions rather than stand-alone actions, since leniency recipients are easier to become the target of follow-on damages action. It is suggested that such positive interaction of the liability of fines and liability of antitrust damages as a limit on joint and several liabilities should be taken into consideration when constructing the antitrust damages action system of China.

Third, as to economic methods and techniques of quantifying antitrust damages, based on Oxera study[476], the EU Commission has put forward a systematic set of methods in 2013 EU Guide[477], including comparator-based, financial-analysis-based and market-structure-based

[476] Oxera, 'Quantifying antitrust damages—towards non-binding guidance for courts', (December 2009), available at: < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10-2015.
[477] EU Commission Staff Working Document, 'Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU', SWD (2013) 205,11.6.2013.

methods. Since these economic methods only involve technical issue rather than political policy choice, the EU Guide could directly provide a guidance for parties and courts of antitrust damages cases in China.

Finally, in order to use these methods to conduct quantitative analysis of antitrust damages, before the actual quantification, the starting point is to establish an appropriate project plan for the compilation of the database which can provide reliable data for economic analysis, and take measures to make sure the access to the data.[478] The access to reliable information and data necessary to support economic analysis has been a significant issue confronted the courts in most jurisdictions.[479] In China, a database specialised for antitrust litigation, including the comprehensive information, statistic, data of the undertakings and the market, should be established to support the antitrust damages litigation. As a supportive measure, the access to public sector information should granted for the purpose of quantification of antitrust damages, in order to ensure the sufficiency and reliability of the data used to estimate antitrust damages.

[478] Peter Davis and Eliana Graces, *Quantitative Techniques for Competition and Antitrust Analysis*, reviewed by Arndt Christiansen, (2010) E.C.L.R., 31(11) 479.
[479] Jochen Burrichter and Thomas B. Paul, 'Economic Evidence in Competition Litigation in Germany', in Kai Huschelrath and Heike Schweitzer(eds), *Public and Private Enforcement of Competition Law in Europe—Legal and Economic Perspectives*, (ZEW Centre for European Economic Research 2014) 219.

Chapter 4 Towards a Workable Antitrust Collective Action Mechanism in China

1. Introduction

Against anticompetitive behaviour affecting a considerable number of consumers, the individual damages litigation has a limited compensation potential, considering that it is difficult for the downstream customers[480] to provide evidence of harm and quantify it, because of the remote link to the causation chain, and the very end position in the distribution chain. Combined with the low-value loss, this has created disincentive for consumers to sue. In such situation, collective redress mechanism[481] would be a possible solution to the lack of incentive to claim antitrust damages in such mass harm situation.

In China, the collective redress mechanism already exists in the civil litigation system in forms of joint action[482], representative action[483], consumers public interest collective action.[484] In relation to the antitrust damages claim, Judicial Interpretation 2012[485] takes a light-touch approach to collective action[486], by simply allowing joint action to be brought against anticompetitive behaviour.[487] Because the general civil litigation procedure could be applied

[480] The downstream customers refer to the customers at the downstream of the supply chain, for example, the indirect purchasers, who have no direct business relationship with the defendant, but have purchased a product from a direct purchaser of the defendant. The indirect purchasers are harmed where they paid higher price for their purchase because the direct purchaser passed on full or part of the overcharge to them.
[481] Collective redress refers to a mechanism to ensure two or more harmed persons or entities could claim compensation or stop illegal behaviour collectively, either through bringing their own collective litigation or through bringing a representative action.
[482] The joint action is the procedure by which the competent court decides to combine the proceedings whose subject matters are the same or similar, into one proceeding, with the consent of parties.
[483] A representative action refers to the procedure by which representative claimants or defendants are elected by respective parties to carry on the litigation in their behalf, where a joint action has large number of claimants or defendants.
[484] Consumers public interest collective action means the collective action brought by representative on behalf of a large number of unspecified consumers where the public interest is harmed.
[485] Provisions on Several Issues Concerning the Application of Law in Dealing with Civil Dispute Cases Arising from Monopoly Conduct was adopted by the Meeting of the Judicial Committee of the Supreme People's Court in January 2012 and came into force in June 2012. Judicial Interpretation 2012, No.5.
[486] Collective action means the litigation collectively brought by more than two natural or legal persons to claim damages or cessation of the illegal behaviour. The discussion of the chapter is restricted to the collective damages action.
[487] Article 6 of the Judicial Interpretation 2012.

to antitrust mass harm claim[488], in theory, the forms of collective action mentioned above could be applicable to antitrust damages claim.

However, questions arise as to whether the existing collective action mechanism in the civil litigation system of China could effectively deal with the anticompetitive behaviour affecting a considerable number of victims, in order to achieve full compensation; if negative, how to enhance the collective action mechanism to make it effectively applying to antitrust mass harm claim.

In order to propose a workable antitrust collective action mechanism, this chapter comparatively refers to the EU's initiative on collective redress, and the UK's recent innovative reform of antitrust collective redress brought about by the Consumer Rights Act 2015(the CRA 2015).

During recent decades, with the increase of anti-competitive behaviour in terms of diversity and sectors in China, anticompetitive conduct tends to harm large groups of consumers and businesses, especially small and medium-sized businesses. The fact that losses of these victims are usually small and scattered, coupled with uncertainty of outcome and the cost of litigation, make victims less incentivised to file litigation against those engaging in the anti-competitive behaviour. For example, in the high-profile *Baidu* case[489], in addition to the plaintiff, there were a lot of other website operators harmed by Baidu's bid-ranking system.[490] The motion of an Internet Antitrust Union[491] for collective action was withdrawn due to the fact that Baidu removed the blockage imposed on competitors' websites, and closed its problematic bid-ranking system. It is worth noting that among consumers and SMEs harmed by anticompetitive

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[488] Preamble of the Judicial Interpretation 2012.

[489] *Tangshan Renren Information Service Co., Ltd. V. Beijing Baidu Network Technology Co. Ltd.*, [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, December 18, 2009.

[490] Baidu, as the largest search engine provider in China, has an advanced pay per click marketing system, by which advertisers are charged per click on an advertisement rather than on the number of users that see the webpage with the advertisement. Baidu adopts two systems to display the search results. The first is based on key-word matches. The second is based on bid-ranking system, by which the ranking is dependent on the amount of advertising fees paid by the advertisers for the Pay for Placement (P4P) program. Advertisers bid for the right to place an advertisement and those who pay more have their advertisements displayed more prominently on the webpage.

[491] The Internet Antitrust Union is consisted of more than 30 lawyers, were launched by Fengchang Wang, the CEO of the Fayi.com.cn, which also has the experience of being blocked by Baidu for 'bid ranking'. It was reported that Changqing Li, as chief lawyer of the Union, assembled about 50 affected website operators harmed by the Baidu's bid ranking behaviour, aimed to file a large-scale collective litigation. Details of the report are available at: http://www.ampoc.org/Info/Article2908.html.

behaviour other than Baidu's bid-ranking system, some individual litigations have been brought by consumers, but very few collective actions have been filed before the competent courts, because some victims were unable or unwilling to seek compensation, even though some kind of collective redress mechanism has been in place for more than twenty years in China.

The basic legal framework of collective action was first established by the Civil Procedure Law(CPL) of 1991.[492] The recently amended CPL in 2012 has further provided conditions for filing such collective litigation[493], and introduced public interest representative action.[494]

It is self-evident that two types of collective proceedings provided by CPL 1991, including joint action and representative action, has been proved to be an ineffective procedural mechanism for vindicating antitrust mass harm claims, because there have been very few litigations brought against anticompetitive behaviour before the court since years. Rights which cannot be enforced through effective remedies and procedures are worthless for citizens.[495] Moreover, the goal of full compensation requires that all the victims could be properly compensated. Accordingly, an effective collective action mechanism is a necessary measure to facilitate small and mass harm antitrust litigation, so as to achieve the goal of full compensation.

Almost at the same time as the 2012 amendment of Chinese Civil Procedure Law, the EU Commission attempted to identify some common legal principles of collective redress to fit well into the legal system of the EU Member States.[496] A resolution was adopted in 2012 by the EU Parliament on collective redress mechanism in order to ensure uniform access to justice within the EU.[497] Ultimately, in 2013 the EU Commission published a Recommendation

[492] Articles 53-55 of the CPL 1991.
[493] Articles 52-56 of the CPL 2012.
[494] Article 55 of the CPL 2012.
[495] The European Commission staff working document for public consultation: Towards a Coherent European Approach to Collective Redress, Brussel, 4 February 2011, SEC (2011)173 final, para.1; Philip Lowe, Mel Marquis and Giorgio Monti, European Competition Annual 2013 ---- Effective and Legitimate Enforcement of Competition Law, (Oxford and Portland 2016) 530.
[496] Commission staff working document for public consultation: Towards a Coherent European Approach to Collective Redress, Brussel, 4 February 2011, SEC (2011) 173 final. In 2011, the EU Commission initiated a public consultation in order to identify a collective redress mechanism which is compliant with Art. 67(1) TFEU, at the same time to forge a European model of collective redress, so as to encourage small and mass claims.
[497] European Parliament Resolution of 2 February 2012 Towards a Coherent European Approach to Collective Redress (2011/2089(INI)).

elaborating on a framework and setting the goal of ensuring that the collective redress procedures in the Member States are "fair, equitable, timely and not prohibitively expensive".[498]

Against the background of the EU Commission and Parliament's endeavours on collective redress mechanism, the Consumer Rights Act, amended in 2015 by the UK government, has brought about significant changes to the landscape of collective redress for competition law infringements in the UK. Among these changes, of particular relevance for this chapter is the discretion of the CAT to join multiple claims; the introduction of the limited opt-out collective proceedings [499] for competition claims; and measures concerning the identity of class representatives. The aim of these changes is to facilitate small mass claims, so as to ensure that victims of competition law breaches, particularly individual consumers and SMEs, are fully compensated for the damage suffered.[500]

It is assumed that the reform to collective actions mechanism of the UK for competition law infringements was triggered by the ineffectiveness of the precious collective proceedings, provided by the old section 47 B of the Competition Act 1998.[501] Under the old opt-in regime, the antitrust damages action represented by an authorized body could be brought before the CAT on behalf of consumers where claimants actively choose to join the proceedings. This has proved unsuccessful as there was only one representative action brought under the old regime by the UK Consumers Association which was the only representative body specified by the 1998 law.[502]

Coincidentally, the current collective action mechanism in China has been undergoing similar failure like the old UK regime, i.e. it has been ineffective and little used to deal with small mass claims for competition law breaches. It has been recognised that lack of incentive led to low

[498] Commission Recommendation of 11June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights COM (2013) 3539/3.
[499] Under the opt-out collective proceeding, claimants with same, similar or related issues of law and fact are automatically included in the relevant class and bound by the judgment unless they actively opt out the class.
[500] Becket McGrath & Trupti Reddy, 'The Consumer Rights Act 2015: full steam ahead for collective proceedings?', G.C.L.R. 2016, 9(1), 15-24.
[501] The old Section 47B of the Competition Act 1998 was added in 2002 by section 19 of the Enterprise Act 2002, which allows the follow-on opt-in representative antitrust damages claims to be brought to the CAT.
[502] Case No. 1078/7/9/07, *Consumers' Association v. JJB Sport plc*, [2009] CAT 2, 2009 WL 364157, 30 January 2009.

participation in the opt-in proceedings in the UK.[503] In China, the collective action mechanism is also suffering from the same problem. This chapter seeks to offering possible solutions to enhancing the collective redress mechanism in China so as to achieve full compensation, with reference to the EU and UK's experience.

This chapter is focused on two questions: firstly, whether opt-out collective proceedings[504] for competition law infringements will fit well with the current collective action system provided by the CPL 2012? Second, what kind of balanced measures could provide consumers and SMEs with more incentives to bring collective actions, while avoiding encouraging unmeritorious litigations? In order to answer these two questions, a critical analysis will be conducted in three steps. First, an assessment of strengths and weaknesses of the current collective action mechanism in China will be undertaken. Second, the EU and UK will be reviewed with a comparative approach taken with regard to the collective regime in China, in particular, the application of the old opt-in proceedings in the UK will be reviewed, and the impact of the newly added limited opt-out proceedings will be examined, in order to provide some lessons for China. Third, upon comparison, the chapter shall make some recommendations on the improvement of collective litigation for the AML breaches in China.

2. A Critical Assessment of the Relevant Legislation in China

2.1 The AML and its 2012 Judicial Interpretation

The AML fails to provide any provision to specifically deal with collective mass harm claims.[505] The Judicial Interpretation 2012 takes a light-touch approach to collective action, providing that when two or more plaintiffs individually bring legal actions in the competent

[503] Under the opt-in proceeding, the representative body has to obtain the consent of the individuals to pursue their claims. Due to the low-value harm, uncertainty of litigation, and difficulty in providing evidence, some of the victims may not have sufficient economic incentive to register their claim to representative body. Also see Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Compensation Law Infringements in the UK: A class act?' Journal of Antitrust Enforcement, 2015, 3, 258-286; Furse M., 'Follow-on Actions in the UK: Litigating Section 47A of the Competition Act 1998' (2003) 9(1) Euro CJ 79-103.

[504] The opt-out proceeding refers to a procedure in which the claimants with same, similar or related issues of law and fact are automatically included in the relevant class and bound by the judgment unless they actively opt out the class.

[505] Article 50 of the AML simply proclaims that victims could seek damages arising from the anticompetitive behaviour of business operators.

courts with respect to the same monopolistic act, the court may consolidate the cases and hear them in a single proceeding.[506]

It is worth noting that Article 6 of the Judicial Interpretation 2012 made some changes to the original equivalent article of its Consultation Paper 2011.[507] The 2011 Consultation Paper made it clear that in an antitrust damage action plaintiffs may either file individual action or file collective action.[508] However, the formally issued Judicial Interpretation 2012 dropped the collective action option[509], instead it highlights the consolidation of individual litigation actions, namely the joint action. However, because provisions of Judicial Interpretation 2012 are formulated in accordance with the relevant provisions of the AML, the Civil Procedure Law, and other laws[510], which demonstrates that the relevant provisions of the Civil Procedure Law should be applied as the legal basis of the antitrust collective litigation, therefore, it is observed that the collective action has already been in place for antitrust damages claims in China, even though the collective action option was omitted from the final version of Judicial Interpretation 2012, and only the joint action is allowed, due to the concern about the court's ability to deal with such mass harm antitrust case.

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[506] Article 6 of the Judicial Interpretation 2012 provides that if two or more plaintiffs individually institute legal actions in the same competent courts in respect of the same monopolistic act, the court may consolidate the cases and hear them together. If two or more plaintiffs individually institute legal action in different competent courts in respect of the same monopolistic act, the court that opened the case later shall, within seven days after learning of the relevant court opening the case first, rule to transfer the case to the court that opened the case first. The court that accepts the transfer may consolidate the cases and hear them together. The defendant shall take the initiative at the response stage to provide to the court that accepted the case information as to its being involved in legal actions in other courts in respect of the same act.

[507] A Consultation Paper for the Judicial Interpretation 2012 on antitrust damages action was issued in 2011 by the Supreme People's Court. The details of the Consultation Paper 2011 are available at: http://www.china.com.cn/news/txt/2011-04/25/content_22435852.htm, accessed in February 2016.

[508] Article 5 of the Consultation Paper 2011, it provides that the victims of the monopolistic act may choose to file individual litigation or to file collective action. If more than two plaintiffs individually file litigations in the same competent court in respect of the same monopolistic act, the court may consolidate the cases and hear them together. If more than two plaintiffs individually institute legal action in different competent courts in respect of the same monopolistic act, the court that opened the case later shall, within seven days after learning of the relevant court opening the case first, rule to transfer the case to the court that opened the case first.

[509] According to the Civil Procedure law of China, the collective action mainly includes two forms: joint action and representative action. Also see Xiaoye Wang & Jessica Su, *Competition Law in China* (2nd edn, Wolters Kluwer Law & Business 2014) 86.

[510] The preamble of the AML provides that to correctly try civil dispute cases arising from monopolistic conduct, prohibit monopolistic conduct, protect and promote fair market competition, and maintain the interests of consumers and public interest, these Provisions are formulated in accordance with the relevant provisions of the Anti-Monopoly Law of the People's Republic of China, the Tort Law of the People's Republic of China, the Contract Law of the People's Republic of China, the Civil Procedure Law of the People's Republic of China, and other laws.

2.2 The Collective Action Mechanism provided by the Civil Procedure Law 2012

The Civil Procedure Law 2012 (the CPL 2012)[511] provides a basic framework for collective litigation, which allows a litigation to be brought by multiple litigants, even by an uncertain number of litigants.[512] The CPL 2012 defines requirements for bringing a joint litigation, allowing individual litigations to be brought jointly when they have same cause of action or their cause of action are of the same category, subject to the consent of competent courts.[513]

In addition to the joint action, the CPL 2012 also provides the representative action, allowing claimants to choose representative to sue on behalf of these claimants. The representative and the represented claimants are bound by the decision of the court.[514]

Before formulating a collective action mechanism particularly for competition law, it is necessary to examine types of collective action provided by the CPL 2012, including the joint action and the representative action.

2.2.1 Joint Action

Broadly speaking, joint actions, as a basic form of collective actions, are available in many jurisdictions.[515] In China, under the joint action proceedings, two or more claims could be combined into a single proceedings and heard together on the grounds that claimants have same interest or the same category of interest in the claim.[516] However, this requirement of "same interest" has made the joint action play an insignificant role in dealing with mass harm claims

[511] The Civil Procedure Law of China, was enacted in 1992, then was amended in 2012. Articles 52-56 provide for collective litigation.
[512] Article 54 of the CPL of China provides that:
Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in nu mber at the commencement of the action, the people's court may issue a public notice, stating the particulars
and claims of the case and informing those entitled to participate in the action to register their rights with the people's cout w ithin a fixed period of time.
[513] Article 52 of the CPL of China provides that:
Where one party or both parties consist of two or more persons, their object of action being the same or of the same category and the people's court considers that, with the consent of the parties, the action can be tried combined, it is a joint action.
[514] Article 53 of the CPL2012.
[515] For example, the UK, Germany, and France. Also see Astrid Stadler, 'Collective Action as an Efficient Means For the Enforcement of European Competition Law', in Jürgen Basedow(ed), *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 195-213.
[516] Article 52 of the CPL 2012.

for competition law breaches in China. Because whether the act of one claimant has binding effect on the other claimants in the proceedings depends on their same interest in the claim.[517]

A good example can be seen in a litigation brought jointly by four technology companies in 2008 against the State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), alleging that AQSIQ required the four companies to use technology in which AQSIQ had a financial interest, which restricted the competition and damaged the companies' technology.[518] Although this case was dismissed by Beijing Intermediate Court due to the expiry of limitation period under the Administrative Litigation Law[519], it is worth noting that subsequently there have been another four companies suing AQSIQ, alleging the same behaviour with the same claim. In this case, joint action was possible because the claimants have the same interest in the claim.[520]

However, joint action has inherent limitations in dealing with collective action for most competition law breaches, for the reason that the claimant class in competition cases do not always have same interest in the respective claims. The AML breaches usually take the form of anticompetitive agreements, administrative monopoly, abuse of dominant position and illegal concentration of undertakings. These conducts, with the effect of restriction, prevention or distortion of competition, tend to undermine the interests of multiple groups of natural or legal persons, both business operators and consumers in the market.[521] In a typical anticompetitive behaviour of price-fixing cartel, victims can comprise of not only direct purchasers, but also indirect purchasers, as often the price-fixing causes the passing on of overcharges.[522]

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[517] Article 52 of the CPL 2012.

[518] *Beijing Zhaoxin Information Technology Ltd., Eastern Huike Anti-Counterfeiting Technology Ltd., Zhongshe Wang Meng Information Security Technology Ltd. and Heng Xin Digital Technology Ltd. v. State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ),* (2008) Beijing No.1 Intermediate People's Court, No.1340. On 1st August 2008, the four technical companies filed litigation against the AQSIQ for administrative monopoly by forcing them to use the AQSIQ's digital supervision network. In September 2008, the Court dismissed the case because the two-year statutory limitation period has expired according to Article 58 of the Administrative Litigation Law.

[519] Under Article 41 of the SPC's Judicial Interpretation in 1999 regarding Administration Litigation Law, the limitation period for first hearing in court is two years since the claimant knows the illegal administrative behaviour.

[520] Following the initial litigation jointly brought by four companies, another four companies, Shanghai Zhongwang Network Ltd., Jiangsu Nanda Digital Technical Company, Shenzhen Beinuo Communication Technical Ltd. and Guiyang Gaoxin Huameilong Technical Ltd. filed separate litigations against the AQSIQ for the same facts and claim. These actions undergone the same fate as the first four companies, which was the dismissal from the Court.

[521] Articles 2 and 3 of the AML 2007.

[522] The direct purchases could pass part or full of the overcharge onto their own consumers as downstream prices. In such

Even for other behaviour prone to restricting or distorting competition, like the concentration of undertakings, the affected persons and businesses are also in large scale. Take an illegal concentration as an example: if a concentration of undertakings is in violation of the AML, the negative effect is not only to reduce the social welfare as a whole[523], but also to harm large group of persons and businesses in a diverse range of ways.

The first harmed group are the parties who contract with the concentrated undertaking: the upstream suppliers and downstream purchasers of the concentrated undertaking in question may well be subject to unfair prices offered by the concentrated business operator due to their weak bargaining power following the concentration. The second group are the concentration's competitors in the relevant market: the increased market power arising from concentration, can have the effect of squeezing out competitors, resulting in the closure of competitors or their withdrawal from the relevant market. The third group are the concentration's potential competitors in the relevant market. Due to the enhanced market power of the concentrating operators, capital, technical and scale barriers can be formed to prevent potential competitors from entering the relevant market.[524]

Hence, in concentration cases, if a large number of diverse victims bring individual claims, and then are joined by the competent courts, the court will face complex joint litigation: the victims usually have different interests in the claim, so the effect of one victim's act in the proceedings cannot be binding on the rest of victims. Therefore, although a single judgment may be made, all the plaintiffs' claims must be treated separately, and awards must be made individually.

The consolidation of multiple claims is also available in the UK[525], which has confronted similar difficulties in dealing with competition law collective actions. In the *Emerald Supplies Ltd* case[526], a collective action was brought on behalf of Emerald Supplies Ltd and Southern

situation, the end consumers, as the indirect purchaser, are also the victims of the price-fixing cartel.

[523] Article 27 of the AML2008.

[524] The market power arising from the concentration may lead to high market entry barrier, which hinder the potential operators from entering the market. Also see Qianlan Wu, 'China's Merger Regulation: In Search of Theories of Harm' E.C.L.R. 2013, 34(12), 634-641.

[525] UK Civil Procedure Rules 1998 r.19.6 provides that where more than one person has the same interest in a claim –
(a) the claim may be begun; or
(b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

[526] *Emerald Supplies Ltd v. British Airways Plc* [2009] EWHC 741 (Ch), [2010] EWCA Civ 1284.

Glasshouse Produce against British Airway's anticompetitive behaviour. However, the High Court rejected the collective element of the action, holding that the claimants, as direct and indirect purchasers of the British Airway, did not have the same interest in the claim. Taking the same standing on this point as the High Court, the Court of Appeal dismissed the appeal from the claimants to bring a collective action.[527]

This case illustrates an inherent limitation of joint action in dealing with competition law mass harm claims: a "legal link" between the claimants is required by the court to join a set of claims brought by several victims against the same defendant. The Civil Procedure Rules of the UK (the CPR) r 19.6 requires such legal link to be the same interest in the claim; and the CPL 2012 of China similarly requires that the legal link has to be either the same interest or fall within the same category of interest. It further provides that one claimant's act has binding effect on the other claimants only if they have same interest in claim.[528] This has greatly reduced the chance to apply joint action to competition law mass harm claims in China. Therefore, the joint action has not proven attractive to litigants pursuing for competition law mass harm claims in China.

2.2.2 Representative Action

Another type of collective proceedings provided by the CPL 2012 is the representative action, where the number of litigants to collective action is more than ten natural or legal persons, these litigants could nominate a representative among themselves to take the action forward.[529] The representative acts on behalf of himself and other litigants, which means that the behaviour of representative is binding not only on himself, but also on represented litigants in the collective proceedings. The law sets out some exceptions to this general rule, providing that the modification, admission, waiver of claims, and compromise with other party by the

[527] *Emerald Supplies Ltd v. British Airways Plc* [2010] EWCA Civ 1284.
[528] Article 52 of the CPL 2012.
[529] Article 53 of the CPL of China 2012; Article 75 of the Judicial Interpretation of the SPC on application of Civil Procedure Law of China which came into force in February 2015. Where the litigants cannot reach agreement on the appointment of the representative, the people's court may nominate a representative and then negotiate with the litigants concerned; if the negotiation fails, the court may appoint a representative from among the litigants who join the lawsuit, as provided by Article 61 of Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law which was issued in1992.

representative, shall be subject to the consent of represented litigants.[530]

Although representative action has been in place as a form of collective redress mechanism for more than two decades in China, it has hardly been used in competition law claims. Some attempts have been made by victims to bring representative action against some giant monopolies. In 2009, Tangshan Renren Information Service Co. Ltd (Renren) brought a litigation against Baidu Network Technology Co. Ltd (Baidu), an internet search engine giant in China, for its anticompetitive bid ranking system.[531]

The case itself is not a representative action. However, more importantly, the response from the other website operators was overwhelming since they alleged that Baidu's bid ranking behaviour also harmed their interest. In response to Baidu's biding ranking system, Li Changqi, as a lawyer of the plaintiff in Baidu case, submitted an application for antitrust investigation to the competent competition authority, namely the SAIC. Meanwhile, an Internet Antitrust Union, consisted of more than 30 lawyers, were organised by Fengchang Wang, the CEO of Fayi.com.cn, which has been blocked by Baidu's bid ranking system. Changqing Li, as a chief lawyer of the Union, has assembled about 50 website operators harmed by Baidu's bid ranking system, aiming to file a representative collective litigation.[532]

However, the Union has not taken further action to bring any collective proceeding before the court. The main reason, as reported, is that Baidu has removed the blockage on these websites, and made great improvement to its bid ranking system. Baidu has closed its old bid ranking

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[530] Article 53 of the CPL 2012.

[531] T*angshan Renren Information Service Co., Ltd. v. Beijing Baidu Network Technology Co. Ltd.*, [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, December 18, 2009. In 2010 the case was appealed to Beijing High Court, and upheld by Beijing High People's Court. Tangshan Renren Information Service Co., Ltd. V. Beijing Baidu Network Technology Co. Ltd., [2010] Gao Min Zhong Zi N0. 489, July 9,2010.
In this case, Baidu provides search engines for internet users to search for any information. The findings of any search would contain the links to the websites relevant to the searched information. Baidu gave rankings of the websites providing the relevant information, and thus charge the websites for better rankings in the search results.
Baidu displays its search results through two separate system:(1) a natural search, which ranks the search results based on search terms and web content; and (2) a bidding search, which charges the companies that want to move their websites up to the top of the search results.
To increase click-through rate of its website, Renren entered a bid ranking agreement with Baidu for period from March 2008 to September 2008. Initially, Renren paid large sums to Baidu. Then in May 2008, Renren spent less on the bid ranking because of business needs. Subsequently, Renren found that the ranking of its websites dramatically reduced, and less webpages could be found through Baidu. In contrast, it could find 6690 pages of its website through Google but only four of its website pages.

[532] It is reported that the Internet Antitrust Union would file a collective litigation against Baidu. Available at http://www.ampoc.org/Info/Article2908.html.

system. Instead, a new system has been applied to tackle the problem of mixture of natural search results and paid research results.[533] The harmed website operators have accepted the Baidu's corrective behaviour.

Although Baidu corrected its anticompetitive behaviour, the damage caused to website operators has not been compensated through an effective mechanism. Therefore, a reflection on institutional reasons of the lack of representative action in the field of competitive law is helpful to enhance the collective action mechanism in China so as to achieve full compensation.

It is well accepted that representative action has been provided as an efficient way for consumers and SMEs to seek to obtain compensation in many jurisdictions, for example the UK, Australia and the US.[534] But in China the current representative action mechanism has failed to provide enough incentives to small-claim consumers and SMEs to bring litigation against major monopolies. It is observed that in addition to low success rates, time consuming and expensive litigation costs are major concerns when considering litigation.[535] In particular, as for SMEs, there are more obstacles which have discouraged them from suing giant companies, for example, the fear of losing a business partner; the potential application of passing-on defence by defendants;[536] and the limited human and financial resources.[537] This has led to very few representative actions being brought by claimants for competition law infringements in China.

Despite being a more efficient way to litigate a mass claim than a joined action in general, the representative action provided by Article 53 of the CPL 2012 has proved not effective in dealing with competition law small mass claims. This is partly due to the underdevelopment of Chinese legislation with respect to the antitrust collective action. The representative action was originally designed to enhance litigation economy by consolidating individual litigation, and

[533] Xiaohong Cui, 'One Hundred of Website Operators Gave Up Filing Collective Action Against Baidu', New Finance, (2009) No.12.
[534] Rachel Burgess, 'SMEs and Private Enforcement of Competition Law: Achieving Redress', G.C.L.R.2016, 9(3), 77-81.
[535] Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?', Journal of Antitrust Enforcement, 2015, 3, 258-286; also see Rachel Burgess, 'SMEs and Private Enforcement of Competition Law: Achieving Redress', G.C.L.R.2016, 9(3),77-81.
[536] Where the SMEs, as the direct customers of the large company, passed on full or part of the illegal overcharge to their own customers, the large company may invoke the passing-on of overcharges as a defense against the damages claim.
[537] Pranvera Kellezi, Bruce Kilpatrick & Pierre Kobel (eds), *Antitrust for Small and Medium Size Undertakings and Image Protection from Non-Competitors* (Springer 2014), 24.

to reduce litigation costs and avoid disparity of judgments.[538] At the early stage of its application, the representative action involved not so many claimants, and also did not present the level of complexity that the recent antitrust mass harm claims have presented.

In practice, the use of representative action has not been living up to expectations in China. Even in a simple representative action where victims could be identified, the courts still tend to deal with the cases separately. Even in some courts, in order to avoid the troubles arising from collective actions, representative actions were dismissed by the courts.[539]

Moreover, the irrational administration of the justice, such as the pursuit of quantity of closed cases and unreasonable distribution of resources, has resulted in the fact that the courts prefer to hear cases separately in pursuit of the amount of closed cases, though the representative action has been in place for many years in China.

2.2.3 The Opt-in Proceedings

In addition to the general representative action, the CPL 2012 also provides opt-in representative proceedings[540], which deal with the situation where the number of plaintiffs or defendants is more than 10 persons[541] and not all are identified at the beginning of litigation. In such scenario, the competent court may issue a notice to the public, specifying circumstances of the suit and instructing all persons whose interests are similarly affected, so as to inform those qualified victims to participate in the litigation and to invite them to register their rights in the court within the specified period.[542] Potential participants who seek to register with the

[538] Fan Yu, *The Research of the Issues of Class Action in China* (1st edn, Beijing University Press 2005).
[539] For example, in *AQSIQ* case, the multiple claims against the AQSIQ was dismissed by the court for the reason of limitation period. But the expiry of limitation period is not a persuasive reason of dismissing the case.
[540] Article 54 of the CPL 2012, it provides that where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the people's court may issue a public notice, stating the particulars and claims of the case and informing those entitled to participate in the action to register their rights with the people's court within a fixed period of time. Those who have registered their rights with the court may elect representatives from among themselves to proceed with the litigation. If the election fails its purposed, such representatives may be determined by the court through consultation with those who have registered their rights with the court. The judgments or written orders rendered by the court shall be valid for all those who have registered their rights with the court. Such judgment or written orders shall apply to those who have not registered their rights but have instituted legal proceeding during the period of limitation of the action.
[541] Article 59 of the SPC Opinion 1992.
[542] Article 55 of the Civil Procedure Law 2012 provides that Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the court may issue a public notice, stating the particulars claims of the case and informing those entitled to participate in the action to register their rights with the court within a fixed period of time. Those who have registered their rights with the court may

court will be required to demonstrate to the court that their interests are similarly affected and that they have suffered damage as a result.[543]

Under the opt-in proceedings, litigants are identifiable, but the number of litigants is not fixed at the time of the action being initiated.[544] The litigants may opt in by two means: first by filing a separate suit[545], and secondly by registering their claims with the court before the deadline for opting-in specified in the court's notice.[546] The legislative dilemma of opt-in/opt-out proceedings only arises from this type of representative action where litigants are identifiable, but the number is not fixed at the beginning of the litigation.

The opt-in proceedings have been used in very few AML claims in China due to its inherent disadvantages. First, the lack of litigation culture in Chinese legal tradition, combined with the fact that each victim tends to suffer from low-value damage in competition cases, make victims reluctant to file individual litigation or to actively register with the court. In some cases, since victims are not well informed about the claim, and even have no idea about the claim, they are not able to make the decision as to whether they would like to join the class.

Secondly, allowing victims who did not register their rights with the court to unconditionally apply the court's decision would unnecessarily lead to a "free rider" problem.[547] The unregistered victims could benefit from the decision without bearing litigation costs, which would give rise to negative effects on the registered victim, and further discourage the potential victim from filing representative actions for anti-competitive behaviour.

Thirdly, the logic underlying the opt-in proceedings is not compatible to full compensation pursued by the AML damages mechanism. For hundreds and thousands of consumers and SMEs harmed by anticompetitive behaviour, each suffering small amount of damage, it is

select representatives from among themselves to proceed with the litigation.

[543] Article 64 of the 1992 SPC Opinion.

[544] Article 54 of the CPL 2012.

[545] If a victim, that has not been registered as party of the representative action, files a lawsuit within the limitation of action period, then the court shall affirm his claim and rule to apply to that judgment it has already rendered in the representative action.

[546] The claimants who already registered their claims in the court have the right to select their representative, and the acts of the representative are binding on the registered litigants. The judgment of court shall be enforced within the scope of registered claimants.

[547] Yang Hongjuan, 'Discussion on the Perfection of the System of Antitrust Class Action', (2011), available at: http://sjk15.e-library.com.cn/D/Thesis_Y1992779.aspx, accessed in March 2016.

difficult to imagine that the victims are fully and properly compensated through an action in which everyone has to actively opt in.

Despite the negative aspect, the opt-in proceedings are still the main stream mechanism that most countries have adopted for their collective actions[548], and the EU Commission also strongly recommends in its White Paper 2008 for advantages of the opt-in proceedings.[549] The Commission, in its Staff Working Paper, clearly limits the possibility of opt-out proceedings in its Member States, giving the reason as follows:

"*However, the analysis in the fields of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features such opt out actions have in other jurisdictions been perceived to lead to excesses. In particular, the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation and would therefore be more easily implemented at national level*".[550]

It has been ten years since the publication of White Paper 2008. The Commission still prefers opt-in proceedings in its recently published Recommendation 2013 relating to European mechanism for collective redress.[551] In addition to the reason expressed in White Paper 2008, the EU Commission has always been struggling against the US-style class action which is assumed to lead to excessive unmeritorious litigation. It is recognised by the Commission that the opt-out proceeding is prone to the abuse of antitrust litigation, and wishes to avoid moving towards the US' aggressive litigation culture.[552]

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[548] Zygimantas Juska, 'Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress', European Journal of Legal Studies, Vol.7 No.1. It points out that only few countries (the UK, Portugal, Denmark and the Netherland) have adopted opt-out proceedings. In the UK, even though the opt-out proceeding has been adopted in recent cases, the opt-in proceeding, as the traditional collective procedure, is still available and widely used for mass harm claim.

[549] Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) Final SEC (2008) 404,405,406. In the White Paper, the Commission proposes two mechanisms for collective actions: one is representative actions, another one is opt-in collective actions.

[550] Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules COM (2008) 165 Final SEC (2008)405, 2 Apr. 2008, 21.

[551] Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law (2013/396/EU), Article 21.

[552] The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, 'Towards a European Horizontal Framework for Collective Redress', COM

Under the opt-in model, victims have to expressly choose to join in the collective litigation to claim their damages. The freedom and rights of the parties could be guaranteed by the opt-in model. On the one hand, it enables the court to manage the case in a more efficient may, and to easily evaluate the admissibility of case and its merits. On the other hand, the right of defendant could be protected as the defendant gets to know who his opponents are.[553] More importantly, the opt-in model is proposed by the Commission to avoid the risk of unmeritorious actions[554], which is an overwhelmingly criticized aspect of the US-style class action.[555]

However, despite these positive aspects, disadvantages of the opt-in model have been arising in the context of encouragement of the collective antitrust actions in EU jurisdictions. It is worth noting that the application of opt-out proceedings is exceptionally allowed by the Commission under the condition that there is sufficient supervision by the court and that the use of such model is justifiable in line with the sound administration of justice.[556]

Since opt-in proceedings require the express consent of victims to take part in the litigation, considering the time and costs spent on the litigation, victims suffering low value damages lack incentive to participate in the litigation: this leads to a low participation rate.[557] Thus, the goal of full compensation and deterrence effect are not effectively achieved. This limitation has been demonstrated in the previous opt-in representative case in the UK, the *JJB Sport* case.[558] In this case, the UK Consumer Association brought a litigation on behalf of consumers who overpaid for football shirts due to price-fixing. Although the Consumer Association made every effort to collect claims, only 600 consumers expressly consented to join the litigation, which was a very low participation rate compared with the number of consumers who were harmed

2013 401/12, para.3.4.

[553] Elisabetta Silvestri, 'Towards a Common Framework of Collective Redress in European? ----An Update on the Latest Initiatives of the European Commission', Russian Law Journal, Vol.I (2013) Issue.1.

[554] The Communication from the Commission, 'Towards a European Horizontal Framework for Collective Redress', COM 2013 401/12, para.3.4.

[555] For the criticism on the US class action, see Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?', Journal of Antitrust Enforcement, 2015, 3, 258-286; Philipp Eckel, 'A Common Approach to Collective Redress in Antitrust and Unfair Competition—A Comparison of the EU, Germany and the UK', IIC 2015, 46(8), 920-939; Zygimantas Juska, 'The Future of Collective Antitrust Redress: Is Something New under the Sun?', G.C.L.R. 2015, 8(1), 14-24.

[556] The Commission Recommendation 2013/396 on common principles for injunctive and compensatory collective redress mechanism, para.21.

[557] Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?', Journal of Antitrust Enforcement, 2015, 3, 258-286; also see M Hviid & J Peysner, 'Comparing Economic Incentives Across EU Member States' in Rodger(ed) 2014, chap. 6.

[558] *Consumers Association v. JJB Sports Plc* [2009] CAT, Case No. 1078/7/9/07.

by the price-fixing behaviour. The Consumer Association, after this case, declared that they would not, therefore, initiate collective actions based on the opt-in proceedings.[559]

Under the opt-in proceedings, because of the low participation rate, in such a large-scale and low-value antitrust damages claim, representative bodies, like consumer associations, tend to confront the deficiency of financial resources[560], leading to the failure of collective action.

Since there has been less litigation culture in China than EU countries, for example, the UK, victims are more reluctant to actively bring antitrust damages claims before the courts. Therefore, the opt-in model is not an effective proceeding to enhance access to justice, nor to achieve full compensation in small mass claims arising from anticompetitive behaviour in China.

2.2.4 The Public-Interest Related Representative Action

Among the amendments in 2012 to the Civil Procedure Law of China, the most remarkable change is the introduction of representative action in relation to public interest, for example, polluting the environment, damaging a huge number of consumers. The authorities or organisations prescribed by law may bring litigation[561], where victims are unidentifiable.

Specifically, as to conducts harming large group of consumers, the 2013 amended Consumers Protection Law provides that the Consumers' Association of China and the consumers' association of each province, autonomous regions and directly-controlled municipality, may bring claims as representative actions before the court.[562] In addition, a recent Judicial Interpretation 2016 of the SPC, concerning consumer public interest representation action, further provides that agencies and organisations designated by law could bring representative

[559] Zygimantas Juska, 'Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress', European Journal of Legal Studies, Vol.7 No.1.
[560] For example, in *JJB Sports* case, the Consumers' Association has confronted difficulties in recovering their costs.
[561] Article 55 of the CPL 2012. The Judicial Interpretation 2016 of the Supreme People's Court on issues of hearing consumer public interest litigations. Such organizations could be, for example, the consumers' association, People's Procuratorate.
[562] Article 47 of the Consumers Protection Law of China 2013, which adds which add that as to behaviour harming a large number of consumers, the Consumer Association could bring litigation before the courts.

actions on behalf of consumers.[563]

As mentioned above, anticompetitive behaviour tends to damage vast number of consumers, and sometimes even harm the public interest. Against such anticompetitive behaviour, representative action could be brought by consumer associations. However, as to SMEs victims, the law[564] remains silent as to which entity could bring claims as representative on behalf of SMEs harmed by competition law infringements.

2.2.4.1 The Public Interest Test

It is worth noting that there exists a public interest test in the representative action brought under Article 55 of the CPL 2012.[565] In other words, damage to public interest is a necessary condition for bringing representative action on behalf of consumers.

The 2016 Judicial Interpretation[566] further clarified the public interest test for purpose of representative action on behalf of consumers. It regards harm to public interest as a necessary condition of bringing consumers representative action. It defines the behaviour harming the public interest in this context to include harming unspecified number of consumers, or threatening the safety, lives and property of consumers.

In the context of competition law breaches, where the unspecified number of consumers have been harmed by anticompetitive behaviour, the public interest test has been triggered. In such situation, the consumer association is the only representative entity designated by law to bring consumer public interest action before the court. Although, in practice, the consumer association has not brought any representative action against anticompetitive behaviour, the Judicial Interpretation 2016 would provide an institutional foundation for the future consumer associations' action on behalf of direct and indirect consumers harmed by anticompetitive behaviour, because nowadays the anticompetitive behaviour tends to affect large unspecified number of consumers, which would trigger the public interest test. Therefore, the public interest

[563] Article 1 of The Judicial Interpretation 2016 of the SPC on Certain Issues Concerning Hearing the Consumer Public Interests Civil Actions.
[564] Article 55 of the CPL 2012
[565] Article 55 of the CPL 2012
[566] The Judicial Interpretation 2016 on the Issues Concerning Hearing the Consumer Public Interests Civil Actions.

test has implicitly provided an underlying link between consumers and competition law.

2.2.4.2 Representative Entity

As observed in *Baidu* case[567], even if a collective action was not eventually brought, a question has been posed as to whether the Internet Antitrust Union is a qualified entity to file representative action on behalf of the website operators harmed by Baidu.

As for the representative action, the issue of qualified representative should be the first consideration when a collective action is intended to be filed. And the qualification of the representative would be one of key elements for the success of a collective action.

The AML and its supplementary Judicial Interpretation failed to provide any provisions regarding the qualification of representatives. Some general provisions on the representatives can be found in the CPL 2012, as observed above. The representative, according to the CPL 2012, can be elected by registered litigants with the court, from among themselves. If the election fails to produce the representative, the qualified representative may be determined by the Court through consultation with the litigants who have registered their rights with the Court.[568]

With regard to the behaviour damaging public interest, such as environment protection, or consumers' interest, the organizations proscribed by law may bring representative action before the Court.[569] For consumers representative action, the consumer association is the sole representative entity designated by the Law. However, for SMEs, the relevant Chinese law is silent on the question of what kind of qualified entities are able to bring representative action for antitrust damages on behalf of SME plaintiffs.

Whereas, in the EU, a qualified entity for the purpose of a representative action is defined as a State body or non-profit organization whose main purpose and activity is to represent or defend the interest of natural and legal persons, other than, on a commercial basis, providing them

[567] *Tangshan Renren Information Service Co., Ltd. V. Beijing Baidu Network Technology Co. Ltd.*, [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, December 18, 2009.
[568] Article 54 of the CPL 2012.
[569] Article 55 of the CPL 2012.

with legal advice or representing them in court.[570]

From the EU Commission's point of view, two types of qualified entities could be authorised with standing to front representative actions in the field of competition law. The first is entities that are officially designated in advance by the Member States to bring representative actions for damages on behalf of identified or identifiable victims. Secondly, the entities could be certified on *ad hoc* basis by a Member State in relation to a specific infringement of EU competition law.[571] In practice, these qualified entities will be consumer organizations, trade associations or State bodies.[572]

Regarding the representative action, Recommendation 2013 of the EU Commission states that the legal standing to bring representative action should be limited to *ad hoc* certified entities, designated representative entities that fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner.[573]

Moreover, the qualification of representative entity has been used as a tool to prevent the pitfalls of the US class action model. As the safeguard against abusive collective litigation, the certification of representative entity has imposed some fundamental criteria: such entities must (i). be not-for-profit entities; (ii) be a direct relationship between their main objectives and the rights claimed to have been violated; (iii) have sufficient financial and human resources, and legal expertise, to adequately represent multiple claimants.[574]

In the UK, under the old representative regime provided by section 47B of the Competition Act

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[570] The EU Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, para. (18). Also see Pinotti & Dana Stepina, 'Antitrust Class Action in the European Union: Latest Developments and the Need for a Uniform Regime', Journal of European Competition Law & Practice, Volume 2, Issue 1, February 2011, 24-33.

[571] Frances Murphy, 'EU Commission Proposes New Measures on Private Actions for Damages and Collective Actions', [2014] 35 E.C.L.R., Issue 5, 223-226.

[572] The former Competition Commissioner Neelie Kroes made it clear that Member States must issue the mandate to bring representative actions to trustworthy entities only and not to an "uncontrolled litigation vehicle set up by lawyers who may be pursuing primarily their own financial interests". Neelie Kroes, 'Consumes at the Heart of EU Competition Policy', speech delivered at a European Consumers' Organisation, 22 April ,2008.

[573] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), para. (18).

[574] Commission Communication 2013, Commission Recommendation, and accompanying text, which detailed the representative action certification criteria proposed by the European Commission.

1998[575], a representative action could be brought by a specified entity on behalf of more than two consumers, which is a kind of consumer representative action, under which the only specified entity was the Consumer Association. There was a high-profile case under section 47B of the CA 1998, *Consumer Association v. JJB Sport*.[576] Among the negative aspects of this case[577], the financial difficulties encountered by the Consumers' Association in recovering their costs has been a significant downside of this case.[578]

In China, the Consumer Association of China has encountered the same financial problem in bringing representative actions, combined with procedural uncertainty before the Judicial Interpretation 2016, the Consumer Association has not brought too much representative actions[579] on behalf of consumers since it has been designated as representative entity by the Consumer Protection Law 2013. Moreover, no attempt has been made by the consumer association as to the antitrust representative action. Thus, the Consumer Association in China has less incentive to bring mass harm claims, which has undermined the consumers' access to justice.

2.2.4.3 Limited Reliefs

Another important limitation of the public interest consumer representative action brought by the Consumer Association of China lies in the lack of damages remedy: as provided by the Judicial Interpretation 2016[580], the Consumer Association can only seek the ceasing of illegal behaviour and elimination of risk, but not compensation for damage.

Whereas, as identified in Chapter 2[581], the goal of an antitrust damages claim is to fully

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[575] The old Section 47B of the Competition Act 1998 was added in 2002 by section 19 of the Enterprise Act 2002, which allows the follow-on opt-in representative antitrust damages claims to be brought to the CAT.
[576] *Consumer Association v. JJB Sport,* Case No. 1078/7/9/07.
[577] For example, the negative aspects include the opt-in element, the lack of incentive for consumers.
[578] Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?', Journal of Antitrust Enforcement, 2015, 3, 270.
[579] Since coming into force of the new Consumer Interest Protection Law in March 2014, the first representative action was initiated by consumer association of Zhejiang Province at the end of 2014, but this case failed to come into the trial, and last it ended up settling between two parties. After the Judicial Interpretation 2016 was issued, 4 representative actions were brought by the Consumer Association of China, and the consumer associations at the provincial level, specifically Ji lin, Jiangsu and Guangdong Province. some of them were withdrew by consumer association, and some of them are still in trial. Also see the report of the SAIC regarding public interest representative action by consumer association in China, available at: http://www.saic.gov.cn/xw/mtjj/201708/t20170828_268695.html, accessed in May 2016.
[580] The Judicial Interpretation on the Issues Concerning Hearing the Consumer Public Interests Civil Actions was issued by the SPC in 2016.
[581] See discussion in Chapter 2: Goals of Antitrust damages action under the AML.

compensate the harm caused to victims. And the purpose of introducing collective redress into the antitrust damages system is to further facilitate the antitrust damages action in mass harm situations, so as to achieve *full compensation*[582]. However, the absence of damages relief from the recently adopted consumer public interests representative action mechanism has made the goal of full compensation difficult to realise. Therefore, the public interest consumer representative action fails to grant consumers the right to antitrust damages, and needs to be further enhanced in order to achieve *full compensation* with respect to antitrust actions, by recognising the *right to antitrust damages* in the context of public interest consumer representative actions.

3. The UK's Recent Developments in Antitrust Collective Redress

3.1 The Background: the EU's Recommendation on Collective Redress

Since 2005, the EU Commission has attempted to initiate a collective redress framework in the field of competition and consumer law, to harmonise the national rules concerning collective action mechanisms in the 2005 Green Paper, by simply raising a question as to whether and how a special procedure should be formulated to facilitate consumer collective actions.[583] In the 2008 White Paper, recognising the necessity of collective redress in the field of competition law, the EU Commission further suggested two types of collective mechanisms which are complementary: the representative action and the opt-in collective action.[584]

Despite attempts in Green Paper 2005 and White Paper 2008, the development of collective redress in the field of competition law within the Europe Union has not lived up to the expectation. The two documents failed to provide for specific measures to facilitate collective redress, so the Commission further carried out a consultation specifically for collective redress

[582] The full compensation principle requires not only all victims, including direct and indirect purchasers, obtain compensation, but also all the losses, including at least actual loss, loss of profit and interest, be recovered to the situation that the infringement had not occurred.
[583] Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672. A simple question has been raised on the collective redress in the Green Paper, and the question is that if special procedures should be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?
[584] White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final, 4.

in 2011, which was "Towards a coherent Approach to Collective Redress".[585] The Consultation took a horizontal approach to dealing with collective redress, covering a wide range of industries, and was not just limited to antitrust claims as initiatives of the Commission had been.

In 2012, the European Parliament also made significant contribution to collective redress, by adopting a Resolution titled "Towards a Coherent European Approach to Collective Redress"[586], which supported the main views expressed in the public consultation of the Commission.

In 2013, the long-awaited Recommendation on collective redress was ultimately published by the Commission.[587] The main purpose of the Recommendation was to ensure the access to justice and full compensation in mass harm situation, while seeking to avoid the abuse of litigation by adopting certain safeguards.[588] The Recommendation put forward some common basic and specific principles that the Member States are encouraged to apply in their national rules concerning collective redress. Moreover, it further clarified the definition of the important terms, and application scope.[589] Guidance on key issues, for example, on litigation funding, representative entities, and admissibility[590], was provided by the Recommendation.

In the development of collective redress at the EU level, a noteworthy issue is the Commission's attitude towards opt-out collective actions. In its 2008 White Paper, in addition to representative action, the Commission only recognised the opt-in[591] collective action, excluding the opt-out collective action.[592] Whereas, in the 2013 Recommendation[593], the Commission exceptionally allows the opt-out[594] collective action to be adopted under the the

[585] Commission Staff Working Document—Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011)173.
[586] European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).
[587] Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU).
[588] Ibid., para.1.
[589] Ibid., Part. II.
[590] Ibid., para.4,5,6,7,8,9 14,15,16.
[591] The opt-in mechanism allows the victims to actively choose to join in the represented class. In such situation, the claimant party is a closed and identified group, and the judgment is only binding on those who opt-in, while the others who do not opt-in could file individual damages actions.
[592] White Paper on Damages Actions for breach of the EC antitrust rules, COM (2008) 165 final, para.2.1.
[593] Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), para.21.
[594] The opt-out mechanism allows those harmed by same or similar infringement to join in the group and to be bound by the judgment, unless they actively choose to opt out the group.

condition of sound administration of justice. It is observed that the Commission has always taken a cautious approach to opt-out collective actions, partly due to its aversion to US-style abusive class action.

Importantly, it is noted that the Commission's Recommendation on collective redress reform was not included in the Directive[595] on antitrust damages adopted in 2014. Instead, the Commission has taken the soft law approach to collective address reform, which does not legally require the Member States to implement. This is partly due to significant differences among the Member States in terms of key principles governing collective redress.[596] Therefore, the Member States could choose a collective redress mechanism which fit well into their own legal culture and traditions, particularly on the issue of opt-in/opt-out options. For example, the reforms in the UK, although generally complying with the Commission, has rendered the UK a leader in adopting the limited opt-out collective action in the Europe.

3.2 The Assessment of the UK's Limited Opt-out Collective Action

3.2.1 A brief introduction of the CRA 2015 reforms in terms of collective redress

In response to the 2013 EU Recommendation[597] on collective redress, the UK has made significant changes to its collective redress mechanism, particularly for competition law claims, by amending the Consumer Rights Act in 2015.[598] The changes introduced by the CRA 2015 were intended to sweepingly reform the private enforcement of competition law in the UK[599], which is specifically reflected in the changes to collective action mechanism for competition

[595] Directive 2014/104, OJ L 349/1.
[596] The differences among the Member State concerning collective redress mechanism exist in the areas of the opt-in/opt-out procedure, litigation funding mechanism, legal standing in the collective proceeding, types of available remedies, and identification of class. Also see Roger Gamble, 'Not a Class Act(yet): European Moves to Softly Towards Collective Redress', E.C.L.R. 2016, 37(1), 14-24.
[597] Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU.
[598] The Consumer Rights Act 2015 came into force on 1 October 2015. It has made a number of changes to the legal mechanism on consumer protection.
[599] Becket McGrath and Trupti Reddy, 'The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?', G.C.L.R. 2016, 9(1), 15-24.

infringements.

Specifically, Schedule 8 and section 81 of the CRA 2015[600] amended Section 47 B of the Competition Act 1998[601] and Enterprise Act 2001 in terms of collective proceedings. Among these changes[602], of particular relevance to this chapter are the expansion of the CAT's power to hearing not only follow-on, but also, stand-alone collective actions, and opt-in/opt-out collective actions. Moreover, the CAT has been granted a wide range of discretion over the decisions as to whether the action can he heard in collective proceedings, and further whether a proceeding is suitable for opt-in or opt-out.

It is noteworthy that in order to avoid unmeritorious litigations, a series of safeguards have been introduced to limit the application of new collective action mechanism. These limitations have been demonstrated in the discretion of the CAT as to class certification, which involves the assessment by the CAT, for example, as to whether the antitrust damages claim is suitable to be brought in collective proceedings, and whether the class representative is qualified under certain criteria.

In order to better implement the CRA 2015, the CAT has issued its own complementary rules, including the Competition Appeal Tribunal Rules 2015 (the 2015 CAT Rules), and the Competition Appeal Tribunal Guide to Proceedings 2015 (the Guidance). Importantly, these two documents have provided specific criteria for CAT's assessment as to certification process[603], for example, the suitability of collective proceedings[604], and the choice about opt-in or opt-out proceedings.[605]

In theory, the new collective redress mechanism introduced by the CRA 2015, implemented under the 2015 CAT Rules and the Guidance, could ensure that those who suffered scattered and low-value damages as a result of competition law infringements--- in particular, individual

[600] Section 81 and Schedule 8 of the CRA 2015 are provided specifically for the competition law provisions.
[601] The old Section 47 B of the CA 1998 was introduced by the EA 2002. It was only limited to the follow-on and opt-in collective actions.
[602] For example, the Collective Proceedings Order(CPO) to be issued by the CAT, funding litigation, the qualification of the class action representative, and the fast-track procedure.
[603] Rules 76-78 of the CAT Rules 2015.
[604] Rules 78(1) of the CAT Rules 2015.
[605] Rules 78(2) of the CAT Rules 2015.

consumers and SMEs were fully and properly compensated for the damage suffered.[606]

However, although it is almost three years since the coming into force of the CRA 2015, it remains unclear as to practical impacts of the new collective action mechanism on antitrust damages claims in the UK. The following part will examine the impact of UK's limited opt-out proceedings based on relevant cases, so as to provide some lessons for the improvement of representative action for competition claims under the AML.

3.2.2 The Assessment of Application of Limited Opt-out Collective Proceedings in the UK

Prior to the reform of CRA 2015 in terms of collective redress for competition claims, the opt-in was the only procedural option for representative action, under section 47B of the CA 1998. Under the old section 47B of the CA 1998, consumer representative action was allowed to be brought before the CAT, by a specified representative entity, on behalf of two or more harmed consumers who expressly consented to join the litigation class[607], which was obviously an opt-in proceeding.

There has been only one such representative action brought before the CAT under section 47 B of the CA1998, which is the infamous *JJB Sports* case.[608] The UK Consumer Association was the only designated specified representative entity under old section 47B. This case has been criticised for its limited number of claimants joining the class, only 550 consumers as the party of claimants. This low number of claimants means that the full compensation pursued by antitrust damages action is far from being achieved. It is observed that the low participation rate has arisen partly from the low incentive provided by opt-in proceedings.[609]

The negative side of this case triggered the advancement of the case to adopt opt-out collective

[606] Becket McGrath & Trupti Reddy, 'The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?', G.C.L.R. 2016, 9(1), 15-24.
[607] The old section 47 B (1) and (4) of the CA 1998.
[608] CAT Case 1078/7/9/07 *The Consumers' Association v. JJB Sport plc*, [2009] CAT 2, 2009 WL 364157.
[609] Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?', Journal of Antitrust Enforcement, 2015, 3, 258-286.

proceedings by the Office of Fair Trading[610], and the Department for Business, Innovation and Skills[611] in the UK. Ultimately, the proposal of opt-out proceeding was codified into the CRA 2015 by adding paragraph (11) into section 47 B of the CA 1998.[612]

Although the CRA 2015 provides for an opt-out proceedings option, in addition to opt-in proceedings, and the class representative could choose between these two options when initiating collective proceedings, the decision as to whether the litigation is processed under opt-in or opt-out proceedings is made by the CAT, and subject to a strict verification process in which the CAT has laid down stringent requirements[613] for the application of opt-out proceedings. It is assumed that the opt-in proceedings are still the CAT's preferred option[614], probably because the opt-out proceeding is a new regime the effect of which remains unclear.

The CAT has been granted a wide range of discretion in determining the issue of opt-in/opt-out option. It is generally set out by the CAT Rule 2015 that the CAT needs to take into account all matters it thinks fit.[615] Furthermore, the CAT Rules 2015 stressed some factors that the CAT needs to consider, for example, *the strength of the claims*, *the estimated amount of the damages that the individual claimants may recover*, *the size and nature of the class*, the possibility of determining whether any person is eligible as the member of class, and the suitability of aggregate award of antitrust damages.[616]

Since the coming into force of the CRA 2015, there have been two cases in which the opt-out collective proceedings have been applied. The first opt-out collective proceeding was filed by Dorothy Gibson, as the representative of harmed consumers, against Pride Mobility Products, for its resale price maintenance behaviour, which has been proved as anticompetitive by the OFT decision. The scope of the class is the potentially overcharged customers. The claimant applied for a Collective Proceeding Order(CPO) on the opt-out basis.[617]

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610 In 2007, the OFT recommended the introduction of opt-out proceedings especially for competition claims.
611 In 2012, the BIS has proposed to adopt opt-out representative collective action for consumers and businesses.
612 Schedule 8 of the CRA 2015.
613 Rule 79(3) of the CAT Rules 2015.
614 Becket McGrath & Trupti Reddy, 'The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?', G.C.L.R. 2016, 9(1), 15-24.
615 Rule 79(3) of the CAT Rules 2015.
616 Rule 79(2) (3) of the CAT Rules 2015.
617 *Gibson v Pride Mobility Products Ltd*, [2017] CAT 9, [2017] 4 C.M.L.R. 33, 31 March 2017.

Assessing the suitability of opt-out proceedings in this case, the CAT further clarified regarding the criteria provided in rule 79(3) of the CAT Rules 2015. It stressed that taking into account the strength of claims does not require a full merits assessment, but rather a high-level review of the strength of claims. In this case, the CAT noted that since this case is a follow-on case, the earlier OFT decision[618] has proved that the breach has an anticompetitive effect on prices. Thus, it assumed that the claim for antitrust damages in this case cannot be regarded as weak.[619]

In addition, in order to justify opt-out proceedings, the CAT took into account such factors as the size of class, the fact that the class members are individual consumers, and the estimated amount that each represented member could recover.[620]

Based on above considerations, as well as other considerations, such as the suitability of collective action[621], and eligibility of class representative[622], the CAT decided to adjourn the CPO application, because this is a follow-on case but the OFT decision is only binding eight retailers, rather than all affected potential purchasers as alleged by Gibson. The CAT did not dismiss the CPO application altogether, instead, it allowed Gibson to reformulate the claim.[623] Finally, Ms Gibson decided to withdraw the CPO application. Despite this outcome, the CAT's attitude in this case has showed some willingness to encourage opt-out proceedings.

However, in another recent high-profile *Mastercard* case[624], the CAT's attitude went harsher and more direct towards the verification of opt-out collective proceedings.

Based on the decision of the EU Commission that Mastercard had abused its dominant position in the consumer credit card market to overcharge fees from its customers under its multilateral interchange fee system[625], Walter Hugh Merricks, as class representative, instituted antitrust damages claims against Mastercard on the opt-out basis before the CAT, on behalf of 46.2

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618 The OFT decision was made in 2014, which was concerned about the agreements between Pride and eight of its retailers, prohibiting them from advertising certain models of scooter online at the price below the recommended retail price.
619 *Gibson v Pride Mobility Products Ltd*, [2017] CAT 9, [2017] 4 C.M.L.R. 33, para.123.
620 Ibid., para.124.
621 Ibid., para. 121,122.
622 Ibid., para. 125-139.
623 *Gibson v Pride Mobility Products Ltd*, [2017] CAT 9, [2017] 4 C.M.L.R. 33, para.146.
624 *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998, 21 July 2017.
625 The EU Commission Decision of 19 December 2007, COMP 34,579 MasterCard, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf, accessed in May 2017.

million UK residents who have used the Mastercard for purchase transactions between 22 May 1992 and 21 June 2008. The claimant applied for the CPO to the CAT under the new section 47B of the CA 1998, in order to continue the opt-out collection proceedings.[626] However, based on a comprehensive and detailed analysis, the CAT dismiss the application for the CPO.

Unlike *Gibson* case, the CAT conducted a very extensive and fact-specific analysis in this case. Assessing the suitability of opt-out proceedings, the CAT questioned the method proposed by the applicant as to how to calculate the aggregate damages, and further the individual customer damages. It held that the applicant "*has no plausible way of reaching very rough and ready approximation of the loss suffered by each individual claimant form the aggregate loss calculated according to the applicant's proposed method"*.[627]

The CAT further reasoned that, for one thing, the applicant's method of calculating the loss was based on a top-down, aggregate basis, which would lead to everyone in the class getting more or less money out of the total pot where there are some victims opt in or opt out of the class, because the proposed calculation is not based on the losses of each individual of the class.[628] Also, under the method proposed by the applicant, it was impossible in the eyes of the CAT to see how the payment to individuals could be determined on any reasonable basis.[629]

Meanwhile, according to the full compensation principle of antitrust damages, which is the restoration of claimants to the position they would have been in without the breach, the CAT assumed that this application of over 46 million claims pursued by collective proceedings, would not result in antitrust damages being paid to the claimants at all under this principle.[630] Under antitrust damages quantification theory, any method and technique of quantification would only lead to an estimated amount of damages. The absence of such method of estimating antitrust damages of each member of class from the aggregate damages award would not in compliance with the fundamental purpose of collective redress, which is to facilitate the initiation of mass harm claims so as to achieve full compensation. Accordingly, the CAT ruled

[626] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998, para.1-15.
[627] Ibid., para.84.
[628] Ibid., para.87.
[629] Ibid., para.88.
[630] Ibid., para.88.

that these claims are not suitable to be brought under opt-out collective proceedings, even though it was noted that it would be impractical to bring claims on individual basis.

It is observed that *Mastercard* case is a setback for new collective proceedings, and will have a discouraging effect on enthusiasm for initiating opt-out collective proceedings for competition claims in the UK.[631]

From this case, it can be seen that the CAT has been good at using it discretion over verification of opt-out collective proceedings. The approach of the CAT to opt-out proceedings has been more cautious than that in *Gibson* case, despite the global rise of collective action. The analysis of the CAT is not only strictly compliant with the criteria set by new section 47 B of the CA 1998, but also is very specific and based on a case-by-case evaluation.

4 Some Proposals for Enhancement of Collective Action Mechanism for the AML Claims-----some lessons learned from the UK

4.1 The Application of Opt-in and Opt-out Collective Proceedings

The representative action provided in Article 54 of CPL 2012 is essentially for opt-in proceedings.[632] This mechanism for reasons explained above has not worked effectively in China since there have been a considerable number of mass low-value claims arising from anti-competitive behaviour, such as *Baidu* case.[633]

Similarly, in the UK, the *JJB Sport* case[634] has demonstrated the limitations of the opt-in collective proceedings in dealing with the consumers' scattered and low-value damages arising from anticompetitive behaviour. Since the consumers lacked incentive to choose to opt in to

[631] Kevin La Croix, 'U.K. Court Halts Effort to Use New Opt-Out Class Action Procedures', available at: http://www.dandodiary.com/2017/07/articles/class-action-litigation-2/u-k-court-halts-effort-use-new-opt-class-action-procedures/, accessed in August 2017.
[632] Article 54 of CPL 2012.
[633] T*angshan Renren Information Service Co., Ltd. v. Beijing Baidu Network Technology Co. Ltd.*, [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, December 18, 2009. Upheld on appeal by Beijing High People's Court, *Tangshan Renren Information Service Co., Ltd. V. Beijing Baidu Network Technology Co. Ltd.*, [2010] Gao Min Zhong Zi No. 489, July 9, 2010.
[634] *Consumers' Association v. JJB Sport plc*, Case No. 1078/7/9/07, [2009] CAT 2, 2009 WL 364157, 30 January 2009.

the proceedings, a very small part of the harmed consumers participated in the litigation, which thereby led to the failure to achieve the goal of full compensation pursued by antitrust damages action.

Since the amendment of the CPL in China in 2012, whether the legislation should go further towards the US-style class action had been under intense debate in China. Some scholars assumed that Article 54 of CPL 2012, should be amended, replacing the existing opt-in with an opt-out mechanism.[635] The debate on opt-out proceedings is not limited to competition clams, but concerned the general civil class actions. Subsequently, a Judicial Interpretation[636], (as discussed in *section 2.2.4.1)*, has made further clarification on the consumers public interest collective action, which has cautiously come closer to the opt-out collective proceedings, though there also exist quite a number of differences.

The consumer public interest collective action provided by the CPL 2012 and its Judicial Interpretation 2016 has been a little similar to the UK's opt-out proceedings in that, firstly, it only applies to the mass claim brought by the consumers; secondly, a designated representative could bring the litigation before the court on behalf of the harmed consumers; thirdly, it is of significance that the represented consumers are mass and unspecified, which means that the scope of the represented consumers is the group of the consumers *potentially* harmed by the same illegal behaviour.

Meanwhile, the differences between the consumers public interest collective action found in the CPL 2012 and the UK'S opt-out collective proceeding are very significant. Foremost, the consumers public interest collective action mechanism fails to provide the consumers with the option of opting out of the litigation. Instead, it provides the consumers with the chance to 'free ride', which allows consumers who bring individual damages claims for the same illegal behaviour to be bound by the judgment of the collective proceedings, if the individual consumers could prove that they are harmed by the same behaviour.[637]

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[635] Renmin University School of Law Team on 'Amendments and improvements of the Civil Procedure Code', *Legislative Proposals for Amendments (Third Draft) to the Civil Procedure Law of the People's Republic of China and the Reasons for the Proposals*, Beijing, People's Court Press, 2005.
[636] The Judicial Interpretation 2016 concerning consumers public interest collective proceedings.
[637] Rule 16 of the Judicial Interpretation 2016 concerning consumers public interest collective proceedings.

Another significant difference lies in the absence of damages relief in the consumers public interest collective action mechanism in China. It only allows the claimants to apply for the ceasing of the illegal behaviour, and eliminating risks.[638] Whereas the ultimate goal of the UK's opt-out collective proceeding is to compensate the harmed consumers, which has been illustrated in the recent *Mastercard* case.[639] In this case, the CAT stressed that a feasible calculation method of the each individual damages recovered from the aggregate damages, is the key to get the CPO (the Collective Proceeding Order) from the CAT, so as to continue the opt-out collective proceedings.[640]

Based on the comparative analysis of the consumer public interest collective actions in China and the opt-out collective proceedings in the UK, it is the author's opinion that the damages relief is needed when consumers public interest collective actions are brought due to the anticompetitive behaviour under the AML. Moreover, the court needs to assess the proposed calculation method of each individual losses recovered from the aggregate estimated damages, to ensure the damaged consumers could get compensated through the collective proceedings.

Due to the public interest test applied in the consumers public interest collective action, it is the claimants' burden of proof to provide evidence that the public interest has been harmed in the context of AML claims. It is predicted that the public interest test would, to some extent, increase the difficulties of claimants in bringing such consumers public interest collective action. But this difficulty can be dealt with by expressly adding the restriction or distortion of competition as the harm of public interest into the public interest test provided in the consumers public interest collective action mechanism.

As for the SMEs harmed by anticompetitive behaviour, it is evident that the consumers public interest collective actions mechanism could not help them effectively claim damages. In such situation, opt-in collective action is the only way of taking private action to claim damages from the giant companies, especially the SOEs. Because, in some cases, some individual small

638 Article 13 of the Judicial Interpretation 2016 concerning consumers public interest collective proceedings.
639 *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998.
640 In *Mastercard* case, the lack of a plausible wat of reaching even a very rough-and ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the applicant's proposed method was the main reason of dismissal of the CPO by the CAT.

companies would not like to bring individual litigations against the big companies, for fear of damaging a necessary trading relationship with the big companies.[641]

Considering the strength and weakness of opt-in and opt-out proceedings, it is suggested that by keeping the opt-in as the primary proceedings, the opt-out proceeding, as an alternative, could be adopted with necessary limits. Specifically, the opt-out proceedings may only apply to the situations of mass consumer damage, where the claimants could provide a plausible way of calculating the individual losses to be recovered from the aggregate damages, as well provide evidence to prove the damage to the public interest. Whereas, the opt-in collective proceeding could apply to consumers and SME mass harm situations.

In deciding whether litigation could be brought on the basis of opt-in or opt-out proceedings, the court has a wide discretion over it. Some necessary considerations are needed for the court to exercise such discretion. These considerations might focus on the number of victims, the likely extent of the individual loss, commonality, qualification of representative entity, funds, and the access to evidence. Furthermore, it is assumed that the assessment of whether these factors are qualified to apply opt-out proceeding is subject to the application of a legislative threshold[642] for damages in the event of an opt-out action. It is suggested, therefore, that detailed standards regarding the above-mentioned factors should be laid down by means of a SPC's judicial interpretation in China to provide guidance for the courts in determining whether the representative action should be based on opt-in or opt-out proceedings.

4.2 The qualification of a Representative Entity

As for consumers collective proceedings, the consumer association in China has been proscribed by the law[643] as the qualified representative to bring claims on behalf of consumers. However, in practice, the financial difficulties encountered by the Consumers' Association of China in recovering their costs has been a significant obstacle to the bringing of successful

[641] Rachel Burgess, 'SMEs and Private Enforcement of Competition Law: Achieving Redress', G.C.L.R. 2016, 9(3), 77-81.
[642] The claimant needs to provide evidence on the method of calculation of the individual losses, and the damaged public interest.
[643] Article 47 of the Consumers Protection Law 2013.

litigation. Similarly, litigation brought by the UK Consumer Association in *JJB Sport* case[644], under the old section 47B of the CA 1998 of the UK, also demonstrated the same financial difficulty for the representative in recovering their costs.

As for the SMEs, on the other hand, the Chinese Law fails to identify a specific body as the representative. In practice, in the *Baidu* case[645], for example, even if a collective action was not eventually brought, the question whether the Internet Antitrust Union was a qualified entity to file a class action on behalf of the website operators harmed by Baidu has been raised.

The issue of the qualified representative should be the first consideration when a collective action is intended to be filed. However, the AML and its Judicial Interpretation fail to provide any provisions regarding the qualification of representatives. Only some general provisions on representatives can be found in the CPL 2012. The representative, according to the CPL 2012, can be elected by the registered litigants with the court, from amongst themselves. If the election fails to produce the representative, the qualified representative may be determined by the Court, through consultation with the litigants who have registered their rights with the Court.[646]

Such representative selection process is time-consuming from the perspective of efficient litigation. More importantly, the right and interest of the representative as a victim may not be properly exercised since the representative is selected from the victims.

However, in terms of the qualifications required by the representative, the relevant Chinese law is still silent on the question of what kind of qualified entities are able to bring representative action for antitrust damages. Instead, the recent tendency concerning the appointment of representative is that the relevant law specifies a body to initiate collective proceedings on behalf of victims. For example, with regard to behaviour damaging the public social interest, such as environment protection, consumers' interest, the organizations provided by law may

644 Case No: 1078/7/9/07, *Consumers' Association v. JJB Sport plc*, [2009] CAT 2, 2009 WL 364157, 30 January 2009
645 *Tangshan Renren Information Service Co., Ltd. V. Beijing Baidu Network Technology Co. Ltd.*, [2009] Beijing Intermediate People's Court No.1, Yi Zhong Min Chu Zi No.845, December 18, 2009.
646 Article 54 of the CPL 2012.

bring representative action before the Court.[647]

This has made great improvement in saving time and protecting the interest of every claimants, compared with the representative selection process provided by Article 54 of the CPL 2012. But it still has significant weakness with regard to the specified representative body, for example, the Consumer Association, has its own limitations in binging antitrust collective proceedings.[648]

Similarly, the EU Commission has proposed that a qualified entity for the purpose of representative action in the EU should be a State body or non-profit organization whose main purpose and activity is to represent or defend the interests of natural legal persons, other than, on a commercial basis, providing them with legal advice or representing them in court.[649]

From the Commission's point of view, two types of qualified entities could be authorised with standing to initiate representative actions in the field of competition law. The first is entities that are officially designated in advance by Member States to bring representative actions for damages on behalf of identified or identifiable victims. Secondly, the entities could be certified on *ad hoc* basis by a Member State in relation to a specific infringement of EU antitrust rules.[650] In practice, these qualified entities could be consumer organizations, trade associations or State bodies[651], but is not limited to them.

Recommendation 2013 further states that the designated representative entities should fulfil certain criteria set by law or to public authorities. The representative entity should be required to prove the administrative and financial capacity to be able to represent the interest of claimants in an appropriate manner.[652]

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[647] Article 55 of the CPL 1012.
[648] The Consumer Associations in China lack of human and financial resources to deal with complicated antitrust collective actions.
[649] Veronica Pinotti & Dana Stepina, 'Antitrust Class Action in the European Union: Latest Developments and the Need for a Uniform Regime', Journal of European Competition Law & Practice, Volume 2, Issue 1, February 2011, 24-33.
[650] Frances Murphy, 'EU Commission Proposes New Measures on Private Actions for Damages and Collective Actions', [2014] 35 E.C.L.R., Issue 5, 223-226.
[651] The former Competition Commissioner Neelie Kroes made it clear that Member States must issue the mandate to bring representative actions to trustworthy entities only and not to an 'uncontrolled litigation vehicle set up by lawyers who may be pursuing primarily their own financial interests'. Neelie Kroes, 'Consumes at the Heart of EU Competition Policy', speech delivered at a European Consumers' Organisation, 22 April, 2008.
[652] Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms

Also, the qualification criteria for representative entity has been used as a tool in the EU to prevent pitfalls of the US class action model. As a safeguard against abusive collective litigation, the certification of the representative entity has imposed some fundamental criteria: (i). it must be not-for-profit entities; (ii) with a direct relationship between their main objectives and the rights claimed to have been violated; and (iii) possession of sufficient financial resources, human resources and legal expertise to adequately represent multiple claimants.[653]

At the UK level, a similar certification process has been proposed for representative bodies to bring the collective actions so as to avoid excessive litigation brought about by US-style class action. In the 2012 UK public consultation on the representative action, a number of possible factors were considered for inclusion in the UK's certification analysis. These factors could include numerosity, commonality, representation adequacy, funding and suitability.[654]

Although some limiting factors have been imposed on the qualified representative body to bring collective action in the UK, the original intention of the private competition enforcement reforms in the CRA 2015 was to expand the scope of eligible representative bodies eligible to bring collective action before the CAT.[655] Accordingly, any representative entity or trade association may have standing to bring an action.[656] While the aim of the reform was to broaden the scope of representative bodies, the legislation also provided some limitations, which, the OFT notes, ensure that collective actions are managed in the best interests of claimants alone, rather than in the interests of third party agent, such as, law firms, third party funders or special purpose vehicles: all are restricted from acting as representative bodies.[657]

The EU's initiatives and the UK's practices could provide valuable guidance for antitrust

in the Member States Concerning Violations of Rights Granted under Union Law, (2013/396/EU), recommendation (18)

[653] Commission Communication 2013, Commission Recommendation, and accompanying text, which detailed the representative action certification criteria proposed by the European Commission.

[654] DEP'T for BUS. Innovation & Skills—2012 Consultation, note 135, which offers factors likely to be considered as part of the UK representative action certification process.

[655] Government Response to Consultations on Consumer Rights 2013, note 26, at 53-54; Consumer Rights Bill, Private Actions in Competition Law 2014, H.C. Bill [161] (UK); 47B Collective Proceedings before the Tribunal, sch.8, at 105(UK), which provides that the Tribunal may authorize a party to act as the representative only if the Tribunal considers that it is just and reasonable for that person to act as a representative.

[656] Government Response to Consultations on Consumer Rights 2013, note 26, at 54, Norton Rose Fulbright, note 122. The collective action could be brought by any appropriate consumer representative body or trade association—much wider than the existing procedure.

[657] Paul Chaplin, 'United Kingdom: UK Government Publishes Draft Consumer Rights Bill including Proposed Reforms to Private Actions in Competition Law', Hogan Lovells, November 2013, available at: http://www.lexology.com/library/detail.aspx?g=d239e926-a9d1-4bef-826e-c7688de8e92, accessed in May 2017.

collective action in China in terms of qualification of the representative entities. In China, organizations, like the consumer association, or trade associations, are usually fully equipped with human resources to obtain the efficiency advantage in representing the individual victims by filing collective actions. However, trade associations should be distinguished from the consumer association with regard to standing in the collective redress action.

The consumer association, whose main objective is to protect consumers' interests, could cover the shortage of the litigation ability of the individual consumers, and its non-profit nature could well guarantee better representation of the consumers' interests in the representative action. The rationale for the standing of the consumer association as a qualified representative in the representative action is that many consumers feel unable to bring a court case on their own, while those who do, may consider the size of their losses are outweighed by potentially high legal costs.[658]

Whereas, regarding the representative action brought by trade associations, as the EU and UK proposed, some limitations should be imposed on the standing of trade associations to avoid unmeritorious litigations filed by trade associations.[659] Although trade associations could improve their self-discipline and coordination, and to some extent protect the order of competition in their industries[660], the behaviour of trade association in its nature is close to joint action with inner risk of anti-competition.[661] This is particularly the case in China. Many of pricing and output restraints are often organized or encouraged by trade associations or industry associations, which are often controlled by Chinese government authority.[662] Due to the possible anti-competitive effect of the trade association, some limitations, such as requirements of filing action, type of litigation brought by the trade association, should be imposed on the right to file litigation of trade associations.

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[658] Representative Actions in Consumer Protection Legislation: Consultation (Department of Trade and Industry, 2006, or the Department for Business Innovation and Skills, BIS as it is now), available at http://www.berr.gov.uk/files/file31886.pdf.
[659] Commission Recommendation 2013/396/EU, recommendation (18).
[660] Article 11 of the AML. It provides that trade association shall strengthen industry self-discipline, provide guidance for undertakings in relevant industries to compete lawfully, and maintain the order of market competition.
[661] Chen Jie,' The Collective Litigation of Public Interest Mode of Antitrust Private Enforcement', Journal of Taiyuan Normal University (Social Science Edition), (2011), issue No.3.
[662] Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law', Antitrust Law Journal, No.1 (2008), available at: https://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf.

Therefore, a certification process should be introduced in China to determine the eligibility of representative entities pursuant to certain criteria, such as the sufficiency of financial, human resources and legal expertise; and whenever there is a direct relationship between the objective of the entity and the interest of represented litigants. The certification process, on the one hand, could guarantee the claim of represented litigants to be better realized through representative action, while on the other hand, could be an efficient measure to avoid abusive litigations.

5. Conclusion

In order to properly and fully compensate for the harm arising from anticompetitive behaviour, in particular, in the situation of mass harm claims, a properly-designed collective action mechanism would be an effective way for consumers and SMEs to recover their losses. This has been demonstrated by the introduction of different types of collective action mechanism in the Member States of the EU.[663]

However, the current legislation concerning the collective action for competition claims in China are not well developed, nor can they keep up with the pace of antitrust mass harm claims. This has led to very few successful collective actions for competition law claims brought by consumers or SMEs.

The Judicial Interpretation 2012 concerning the antitrust damages action generally allows two or more actions to be heard jointly in a single trial.[664] This could serve as a legal basis of collective redress in the field of competition law. But it fails to provide any detailed procedural regulation and guidance for collective actions based on the AML.

The collective redress mechanism provided by the CPL 2012 includes three types of collective proceedings: joint action; opt-in representative action; and public interest collective action. But each action has its own weakness when invoked in mass harm claims. The joint action and opt-in representative action are fine so far as they go, but they are unsuitable for competition law

[663] Commission Recommendation 2013/396/EU, para. (9).
[664] Article 6 of the Judicial Interpretation concerning antitrust damages action, which was issued in 2012 by the SPC.

mass harm claims, because they are suitable for the claim brought by a small number or specified number of consumers, rather than the mass harm claim. The public interest collective action is a potentially significant innovation which may enhance consumer collective redress, because it allows the representative action to be brought on behalf of a large and unspecified number of consumers.

However, any expectation of the newly added consumers public interest collective action in China in order to fill in the procedural gap have been undermined by the lack of damages relief, as well as the limitations of the consumer association as the designated representative in bringing collective claims. Due to the lack of specific procedure, there has been no such consumers public interest collective action brought by consumer associations, since the public interest collective action mechanism were put into place in 2012.[665]

Therefore, inferred from the analysis above, we can say that China has no effective procedural mechanism to be used as vehicle for dealing effectively with small mass claims for competition law breaches. It is noted that the consumers public interest collective action mechanism is similar to the opt-out collective proceedings recently adopted specifically for competition law claims in the UK, in that the consumer association could bring collective action on behalf of the unspecified number of consumers.

There have been several cases brought before the CAT on the basis of opt-out proceedings. Even though some limitations have been imposed on the application of opt-out proceedings, the CAT still has taken cautious approach to opt-out proceedings, especially in the recent *Mastercard* case.[666] The CAT conducted a highly fact-specific analysis concerning the opt-out proceedings in this case, dismissing the CPO, because it found no practical way to calculate an estimated loss of each individual claimant from the aggregate damages from the method proposed by the applicant.

In China, the compensation for losses is not provided as a relief by the consumer public interest

[665] The consumer public interest collective action was firstly adopted by amending the CPL in 2012, then it was further regulated and clarified with some detailed implementing measures by issuing a judicial interpretation in 2016.
[666] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998.

collective action mechanism, therefore, in order to incentivise consumes to launch collective action, damages relief is needed as the main relief type for the consumer public interest collective action especially for the AML claims. The competent court should have discretion over whether the litigation could be brought on the basis of opt-in proceedings, or public interest collective proceedings, according to criteria, such as the scale of claimants, commonality, suitability, the public interest test and the goal of full compensation.

It is worth noting that both opt-out proceedings in the UK and the consumers public interest collective action in China are only applied to the collective action brought by consumers. As for SMEs, the old opt-in representative action can still be applied to mass harm claims of the small companies. In such a situation, trade associations need to be allowed to bring such collective action on behalf of small businesses, provided these associations satisfy the requirements set out for the representative, for example, the sufficiency of financial, human resources and legal expertise; and the presence of a direct relationship between the objective of the entity and interests of represented litigants, and no conflict of interest.

Chapter 5 The Damages Action against Administrative Monopoly under the AML

1. Introduction

This chapter seeks to explore the antitrust damages mechanism for a characteristic type of the anti-competitive behaviour in China—administrative monopoly[667], which is also a field significantly ignored by the antitrust legislature of China, therefore full of uncertainty and ambiguity. It is intended to provide approaches to developing a workable damages mechanism against administrative monopoly under the AML 2007 from substantive and procedural perspectives, with reference to Article 106 TFEU and the EU public procurement damages mechanism. The chapter aims to address three issues: first, what approach can courts take to determine whether a particular anticompetitive regulation is justified on grounds of public interest or whether such regulation amounts to abusive and ultimately illegal conduct? Second who should assume civil liability for the damages arising from the abuse of administrative monopoly in China? Third, which procedural steps can be taken under the AML to ensure access to courts and make sure that the damages resulting from such anti-competitive conduct are awarded to victims of administrative monopoly?

Administrative monopoly, as an inherent characteristic of a centrally planned economy, is still a ubiquitous phenomenon in China, even though it has been almost 40 years since the economic transition from the "planned economy" to "market economy" has been launched in China. There has been a consensus among the legal academics and practitioners that administrative

[667] In this chapter, the expression of "administrative monopoly" or "abuse of administrative monopoly" are not official terms used by legal documents, but they are widely used in Chinese legal research literature to refer to the administrative measures restricting competition，also see Changqi Wu and Zhicheng Liu, 'A Tiger Without Teeth? Regulation of administrative monopoly under China's Anti-monopoly Law', Rev Ind Organ (2012) 41, 133-155; Sheng Hong, Zhao Nong & Yang Junfeng, *Administrative Monopoly in China*, Series on Chinese Economics Research, Vol.10, Unirule Institute of Economics; Thomas K. Cheng, 'Abuse of Administrative Monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015). Some foreign scholars researching this subject usually use other terms to describe such state-appointed restraints of competition, for example, state monopoly, government restraints, also see Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the walls of government restraints', Antitrust Law Journal, Vol.75, No.1 (2008), 173-194. The AML employs the term "abuse of administrative powers to restrict competition", which has the same meaning as that of "abuse of administrative monopoly", "administrative monopoly" and "government restraints" usually used by legal scholars and practitioners in the EU. This chapter follows the academic usage, which is "abuse of administrative monopoly", or "administrative monopoly" as appropriate to the context in some places, to describe the administrative measures restricting market competition.

monopoly causes serious harm to China's economy[668], with some even taking the view that the harm caused by administrative monopoly is greater than that of general commercial monopolies. Indeed, it has been well accepted that the state intervention in the economy could pose even greater harm to competition than that brought by purely commercial monopoly, main reason of which is that the incompatibility of policy objectives pursued by certain state measures, for example, the protection of national brands, with the fully competitive free market rationale.[669] Specifically, the administrative monopoly leads to consumer welfare losses, economic inefficiency, and corruption[670], most of which are the outcomes which the AML aims to diminish. Thus, it is appropriate that the administrative monopoly should be the focus of prohibition in the AML.

In practice, since the entry into force of the AML in 2008, there has been very few cases brought to the court against administrative monopoly, needless to say the compensation for the harm caused by such anti-competitive behaviour. Among these few examples of anti-administrative monopoly litigation, the most striking one is *AQSIQ* case[671], in which although the court dismissed the case on the basis of the expiry of limitation periods[672], it identified a gap in the AML, which is the lack of a private suit mechanism against administrative monopoly under this law. Several cases concerning administrative monopoly have also been brought before the courts after *AQSIQ*, but victims in all those cases failed to obtain compensation for the damage caused to them arising from the action of an administrative monopoly. In these cases, the "best"

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668 Wang Xiaoye, 'The Government Behaviour in the Anti-Monopoly Law of China', (IO Law), available at: http://www.iolaw.org.cn/showArticle.aspx?id=1936, accessed January, 2017; Guangyao Xu, 'Analysis of Administrative Monopoly in the Anti-Monopoly Law of China', Administrative Management Reform, 2014, also available at: http://theory.people.com.cn/n/2014/1208/c207270-26167974.html, accessed January, 2017; Chengwei Yu, 'The AML Control Over the Administrative Monopoly in China', Issue 2, 2016, Tian Shui Xing Zheng Xue Yuan Xue Bao(天水行政学院学报), 96.

669 Jose Luis Buendia Sierra, 'Article 106---Exclusive or Special Rights and other Anti-Competitive State Measures', in Jonathan Faull & Ali Nikpay(eds), *The EU Law of Competition* (3rd edn, OUP 2014).

670 Changqi Wu & Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ (2012) 41, 133-155.

671 *Beijing Zhaoxin Information Technology Ltd., Eastern Huike Anti-Counterfeiting Technology Ltd., Zhongshe Wang Meng Information Security Technology Ltd. and Heng Xin Digital Technology Ltd. v. State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ),* (2008) Beijing No.1 Intermediate People's Court, No.1340. This case was filed on 1 August 2008, just on the same day when the AML came into force.In this case, eight Chinese companies which have developed electronic anti-counterfeiting technologies brought a suit against the Administration of Quality Supervision, Inspection and Quanrantine (AQSIQ) for abuse of administrative monopoly in Beijing First Intermediate People's Court, alleging that the AQSIQ designated a specific electronic network of supervising product quality developed by a particular company, which seriously hindered these eight companies' access to relevant market, and further inhibit the fair competition.

672 The limitation period of the first-instance administrative proceeding is 6 months, according to Administrative Procedure Law of China 2015.

outcome was that the court declared that the relevant administrative measures constituted administrative monopoly[673], but the court did not go further to consider the antitrust damages award for the losses caused to the victims.

One of reasons leading to the dilemma is the ambiguity in the language of the AML on the question of whether victims have right to antitrust damages arising from administrative monopoly. Chapter 5 of the AML[674] is devoted to administrative monopoly prohibitions, which lists types of administrative monopolies caught by Articles 32-37 of the AML, including not only the abuse of administrative power through specific designated undertakings, but also the anti-competitive government behaviour themselves by imposing regulations or orders, for example, regional protectionist measures and discriminatory bidding requirements. The specific types of administrative monopolies, for instance, inappropriate designation of product supplier to purchasers, discriminating against non-local businesses in the bidding procedure are prohibited by Article 32-36. Meanwhile, Article 37, as a catch-all provision, generally prohibits administrative measures that restrict or eliminate competition.

However, Chapter 5 of the AML lacks enforceability in that there exists no effective private enforcement mechanism against the administrative monopoly within the AML. Article 50 of the AML[675], as well as its Judicial Interpretation 2012[676] apply only to anti-competitive behaviour conducted by business operator in practice, and it is not clear whether it could be applied to the administrative measure restricting competition. Thus, the lack of remedy mechanism against administrative monopolies has caused the scarcity of administrative

[673] For example, *Shenzhen Siweier Technology Ltd. v. Department of Education of GuangDong*. In this case, Siweier Technology Ltd. brought a lawsuit against Guangdong Education Department, alleging that Guangdong Education Department's illegal designation of a specific software of Guang lian da, the competitor of Siweier, in a national contest, has blocked Siweier's access to the relevant market, and thus, eliminated the competition. The Court ruled that the behaviour of the Department of Education of Guang Dong province breached Article 32 of the AML, constituting the abuse of administrative monopoly. But the Court overturned the damages claim of the plaintiff on the ground that there was no direct loss caused to the plaintiff.

[674] Chapter 5 prohibit the government agencies from abusing their power to intervene in competition, especially focusing on the protectionist and discriminatory behaviour. The six articles of this chapter list different types of the administrative monopolistic behaviour, including forced trade of certain undertaking by administrative agencies in Article 32, regional protectionism in Article 33, local protectionism and discrimination in bidding procedure in Article 34, entry barrier to local market in Article 35, compelling undertaking to engage in anti-competitive activities in Article 36, and general anti-competitive regulations of the government agencies in Article 37.

[675] Article 50 of the AML provides that the undertakings that engage in anti-competitive activities and cause damage to others shall assume civil liability.

[676] Provisions on Several Issues concerning the Application of the Law in Trials of Civil Dispute Cases Arising from Anti-Competitive Acts, issued by the SPC in 2012, stipulates 16 general provisions on the antitrust damages action in China. It is referred to as Judicial Interpretation 2012 in the text of this chapter.

monopoly damages cases in Chinese courts. Therefore, the enforcement of the AML against administrative monopoly is an area which has been somewhat overlooked by Chinese legislation, particularly, the specific rules regarding remedy mechanism is all but absent.

In EU law, although there is not an equivalent term to capture the exact same meaning as administrative monopoly in China, Article 106 TFEU [677] specifically deals with the relationship between competition law and state measures. It addresses the application of EU competition law to State measures realized through public undertakings[678], the undertakings granted special or exclusive right[679]and undertakings providing "service of general economic interest"(SGEI).[680] It is usually stressed that there are limits imposed on the application of competition law to state measures in two respects: the first limit is to determine whether the activity in question is economic.[681] Non-economic activities conducted by state-appointed entities will be excluded from the ambit of competition law regardless of whether the entity is governed by public law or is otherwise profit-making.[682]

The second limitation is from effective operation of particular tasks, which could be the provision of services of general economic interest, or production of revenue.[683] In other words,

[677] Article 106 TFEU provides that:
1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[678] The EU Commission Transparency Directive provides a clear definition of public undertaking, which is generally the undertaking directly or indirectly controlled by public authorities through ownership, financial participation, and contractual or structural relationship.

[679] As to the exclusive or special right, they are two different type of monopoly right. According to the case law of CJEU, generally speaking, the exclusive right is granted by government to one undertaking for a particular economic activity on the exclusive basis; and the special right has been defined by the Commission in the Directive 94/46, which stresses that the special rights are granted through any legal, regulatory or administrative instruments to a limited number of undertakings which are determined on the discretionary and subjective ground.

[680] The concept of SGEI was first added to the EC Treaty in 1999 by Article 16 of the Treaty of Amsterdam. Then it was developed by the Treaty of Lisbon. Now it appears in Article 14 and Article 106(2) TFEU. It is worth mentioning that this concept has never been defined by any EU Treaty, since it is 'dynamic and evolving', as the Commission described. Therefore, the CJEU has developed a considerable body of case law as to what amounts to SGEI. From the relevant interpretation of the CJEU in previous cases, it is assumed that SGEI is generally the economic activities which need to be carried out in the public interest, and such services would not be supplied without the public intervention.

[681] For example, the ruling in *Höfner* further clarified that the any entity engaged in economic activities should fall within the scope of the competition law, regardless of its legal status and the way it is financed.

[682] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 600.

[683] Article 106(2) TFEU.

the application of competition law should not hinder the effective performance of such tasks assigned to undertakings. In such scenario, the limited application of competition law has to some extent left room for the States' political considerations.

While it is conceded that administrative monopoly only exists in China, nevertheless, it is observable that actions conducted by the governments of EU Member States, which inappropriately intervened in the market economy, undermining the competition in the EU internal market, raises interesting parallel with developments in China. Therefore, in terms of substantive regulation of government measures restricting competition, EU law would provide some guidance to China's legislature, on the ground of the similarity in the goal of establishing internal market and a single legislative approach to regulating state-sourced anti-competitive measures in China.

On the one hand, the goal of market integrity has been commonly pursued by the EU and China. Since 1979 a series of economic reforms have been taken by China to help the economic transition to a market economy. Decentralization, as part of economic reforms, caused the central government to delegate some of its power to the provincial and local governments.[684] However, the local governments entrusted with such powers tend to abuse their power by setting up barriers to free trade within China's internal market.[685] Local administrative monopolies in particular can impede market integration by creating regional trade barriers, as forms of local protectionism.

Thus, breaking protectionism and regional blockage has been one of tasks of Chinese government in order to realize the "integral market" in China.[686] The Chinese legislature attempts to curtail such anti-competitive measures through chapter 5 of the AML. Therefore, because the operation of administrative monopoly in China can serve as a barrier to competition between regional markets, it is believed that the AML was to be a tool tasked with reorganising

[684] For example, in 1981 the approval authority on the infrastructure construction plan which was originally in the hand of central government was partly delegated to the provincial governments. In 1982, the Temporary Regulation on Price Management was issued to delegate some of the price management authority to local governments.
[685] These barriers were designed to keep non-local goods and services out of their own local region, in order to monopolize the market for local governments.
[686] Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.

the divided market into a single one, through prohibition of administrative monopoly anti-competitive behaviour.

Such regional trade barriers within China were estimated to be operating in a similar fashion as those trade barriers between the EU Member States before the goal of internal market was pursued by the Union.[687] In the TFEU, the goal of Internal Market is established.[688] The free movement of goods, service, persons and capital should be realized in the internal market.[689] To help achieve this goal, Article 106 TFEU[690] has played its part to prohibit state-appointed anti-competitive measures from restricting or distorting the market competition and further hindering the market integration of the European Union.

Similar to the objective of establishment of an Internal Market in Europe, China's reforms have targeted a unified, open, competitive and orderly national market. Therefore, the EU's practices and experience provide China with important insight in terms of how to organise an effective administrative monopoly control under the AML.[691]

Also, of relevance to looking to the EU model, is the fact that the EU and China have a similar approach to regulating private/public anti-competitive measures. Although in many jurisdictions the public and private restraints on competition are often dealt with by separate laws;[692] or antitrust law does not always govern the protectionist trade restraints initiated by States[693], in China and the EU, the legislative approach to regulating the public and private

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[687] B.Y.Guan, F.Huang & J. Cao, *Regulation on Enforcement of Administrative Monopoly*, (China University of Politics and Law) 51 et seq. Also see Thomas K. Cheng, 'Abuse of Administrative Monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015) 138.

[688] The Internal Market formally commenced with the adoption of the Single European Act, which came into force in 1987.The major objective of the Act is to add a new momentum to the process of the European establishment so as to complete the internal market. After the Treaty of Lisbon amended the TEU and the EC Treaty, and renamed the EC treaty as the TFEU, Article 3(3) TEU restates the objective of establishment of internal market, and it is defined in Article 26 TFEU.

[689] Article 26 of the Treaty on the Functioning of the European Union(TFEU) provides that:

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

[690] Text of Article 106 TFEU.

[691] Changqi Wu & Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ (2012) 41,133-155.

[692] For example, United States, Brazil, Turkey, Hong Kong(China), Singapore, Peru. See report of UNCTAD Research partnership platform, 'Competition Law and State', UNCTAD/DITC/CLP/2015/3 United Nations 2015.

[693] For example, in US, where the Commerce Clause of the US Constitution prohibits the States from adopting and maintaining measures restricting competition among the States, while the private anti-competitive behaviour are subject to the Sherman Antitrust Act. Under the US Commerce Clause, the states may not impose discriminatory burdens on non-local

monopolies is integrated as a single approach.

Unlike the US's separate laws governing public and private restraints[694], the EU approach is viewed as seamless control over the public and private restraints:[695] the CJEU has ruled that the Article 4(3) TEU[696] and Article 101, 102 and 106 should be read together.[697] Due to these integrated obligations, anti-competitive state measures, are within the scope of competition policy regulation, and are subject to the same prohibition as the private constraints of competition, though some exemptions might be granted to governments as provided in Article 106 TFEU. As some European scholars reviewed, a competition policy that omits to address the state intervention in the market competition would be incomplete.[698]

In this respect, therefore, the EU and China take a similar approach to dealing with public and private restraints of competition, which is within one single legal framework, namely competition law. China has no commerce clause to counteract market-blocking restraints: the AML intends to regulate both public and private abusive monopoly, since the Chinese legislature assumes the problems are integral as they have similar outcomes: i.e. restricting or eliminating competition in the market, thus it is a viable option to deal with them under one legal framework, which is the AML.

Based on the above-mentioned similarities in goal of internal market and regulatory framework between the EU and China in terms of the control of government anti-competitive measures, the EU legislation and the CJEU's case law concerning State-sourced restraints on competition could provide helpful guidance for the enhancement of China's administrative monopoly control, particularly in terms of reforming and strengthening the *substantive rules* surrounding

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enterprises. Therefore, the US has two legal documents to respectively regulate state anti-competitive measures and private restraints.

694 Alternatively, public and private anticompetitive behaviour.

695 Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.

696 According to Article 4(3) TEU, the Member States have a general obligation to cooperate with the EU to facilitate the objectives of the Treaty on the Functioning of the EU.

697 For example, in Case 267/86 *Pascal Van Eycke v. ASPA NV* [1988] ECR 4769, the Court stressed that a state measure would be incompatible with Article 4(3) TEU read together with Article 101 or 102TFEU if it were to require or favour the adoption of the agreement or practice contrary to article 101 TFEU. Also see, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law—Cases and Materials*, (2nd edn, CUP 2014).

698 Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 598.

the anti-administrative monopoly damages action in China.

Meanwhile, in terms of reforming *procedural aspects* of the administrative monopoly damages litigation of China, the EU's legislation on damages procedure for infringement of public procurement could be a good paradigm for China to fill in the procedural gap in China's administrative monopoly damages litigation. The public procurement contract, as an essential aspect of public sector activity[699], involves administrative agencies as a party of the contract. Its damages actions occur between a private undertaking and government body, so its procedural rules may well be referred to improve the procedural legislation of antitrust damages for abuse of administrative monopoly, which also involves the damages award from government agency as one party of the antitrust damages litigation.

The EU Directives[700] have provided a framework requiring the Member States to lay down provisions for the awarding of the damages for infringement of EU law on public contracts. The procedural rules in this field of public procurement have been well developed in the most EU Member States, for example, the UK, Germany, France and Portuguese.[701] Therefore, the procedural rules concerning the public procurement damages in the Member States could be used as a good reference for China to improve procedural legislation with regard to anti-administrative monopoly damages litigation, on the basis of the similar nature of the litigation parties in the proceedings.

Although the public enforcement of administrative monopoly under the AML has also been widely criticized for its ineffectiveness by the academics and the public in China[702], this chapter

699 Duncan Fairgrieve & Francois Lichere, *Public Procurement Law – Damages as an Effective Remedy*, (Hart Publishing 2011) 1.

700 The Directives include Directive 1989/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Directive 1992/13 EEC on coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; and Directive 2007/66/EC with regard to improving effectiveness of review procedures concerning the award of public contract.

701 Duncan Fairgrieve & Francois Lichere, *Public Procurement Law – Damages as an Effective Remedy*, (Hart Publishing 2011).

702 Mel Marquis, 'Abuse of Administrative Power to Restrict Competition in China: Four Reflections, Two Ideas and a Thought', in Michael Faure & Xinzhu Zhang(eds), *Regulation and Competition Policy in China: New Developments and Empirical Evidence,* Edward Elgar, 2013, 73-141; Thomas K. Cheng, 'Abuse of Administrative Monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015); Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007; Changqi Wu & Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ (2012) 41, 133-155; Sheng Hong, Zhao Nong & Yang

is restricted to the discussion of antitrust damages mechanism against administrative monopoly due to the limitation of theme of the thesis solely focusing on private aspects of the AML enforcement. Thus, the chapter is structured as follows:

Following the introductory section, Section 2 gives a historical review on administrative monopoly in China and its current enforcement mechanism under the AML. Section 3 examines how anti-competitive conduct by states is dealt with under EU law. In particular, Article 106 TFEU and corresponding case law on anti-competitive measures taken by public undertakings and undertakings to which the Member States grant special or exclusive rights shall be critically assessed here. Section 4 deals with the substantive conditions of antitrust damages claim against administrative monopoly under the AML which need to be fulfilled for successful damages claim in general and in particular with the exemption which may be granted in case of certain state anti-competitive actions under Article 7 of the AML. Also, the question of who should assume civil liability for antitrust damages arising from the abuse of administrative monopoly in China will be dealt with in this section. These questions shall be analysed from a comparative law perspective. To this end, the relevant legal questions dealt with in this section shall be analysed in detail against the background of the standards as defined by European courts under the regime of Article 106 TFEU. Section 5 discusses the procedural aspects of administrative monopoly damages action. A two-step procedure, including first the judicial review of the administrative measure, and second the award of damages, appears to be favourable in this regard, in particular taking into consideration the remedy procedures in case of public procurement cases in some of the EU Member States. The final section provides a conclusion on this chapter, summarising key points of the discussion and providing some suggestions on the legislation of antitrust damages litigation arising from administrative monopoly under the AML.

Junfeng, *Administrative Monopoly in China--- Causes, Behaviour and Termination,* Series on Chinese Economic Research Vol.10 (Unirule Institute of Economic 2015).

2. Historical Review of Administrative Monopoly and its Enforcement in China

2.1 The Origins of Administrative Monopoly in China

China used to be a centrally planned economy[703] before it launched its economic reform in 1978. It is observed that the administrative monopoly was an inherent characteristic of the planned economic system.[704] Due to the inertia of the planned economy, although it has been almost 40 years since the economic reforms have commenced, the administrative monopoly is still ubiquitous in China.

In order to realize the economic transition from planned economy to market economy, the Chinese government reduced and relaxed its control in most sectors, competition has been encouraged, and the market economy has been taken shape.[705] However, since the path of China's economic reform is deregulation of the economic power from central government to local governments, rather than privatization of its economy, this meant that the national economy is still under the control of the central government.[706] In some sectors, like the power, railways and the postal service, the government has taken positions of the game rule maker, participant and referee at the same time.

The planned economy also resulted in blurring the line between the government and enterprises, which has led to the direct command and management by the government of enterprises. Although this situation has improved a lot since the economic reform, the operation of enterprises has not completely separated from government control, particularly in the case of

[703] Under the planned economy, the economy and even all behaviour of enterprises were completely controlled and managed by the government, via administrative regulations, directives or decisions. The government's control prevailed in almost every sector and every aspect, from market entry to supply of raw materials, from price fixing to production output, all of which were under the direct control of the government.

[704] Changqi Wu & Zhicheng Liu, 'A Tiger without teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ (2012) 41, 133-155.

[705] Yong Guo & Angang Hu, 'Administrative Monopoly in Economy Transition in China', China Institute for Reform and Development, available at: http://www.chinareform.org/publications/reports/200206/t20020618_111297.htm, accessed in February 2016.

[706] In some sectors, particularly in network industries, such as power, telecommunications, railways, postal services, etc., the administrative monopoly is still in place; it still engages in anti-competitive activities through non-SME-friendly industrial policies and administrative measures, with the "blessing" of sector management and the perceived need to maintain market order.

SOEs.[707] Furthermore, and separately, there is the matter of corruption, with occasional reports of how some administrators abused their administrative status by issuing orders for their own personal/departmental interests.

More importantly, the close links between government and enterprises caused the administrative monopoly: the administrative monopoly has been achieved mainly through State-Owned Enterprises (SOEs). Under the planned economy system of China, the operational activities of enterprises were all under control of the Government. During the economic transition process, while the separation of government from enterprises posed a difficult challenge for system reform; on the other hand, the government, playing in a combined role of market participation and regulatory responsibility, has achieved a significant, though incomplete, economic transition from a centrally planned economy to a market economy, by blind pursuit of the policy goal of boosting economic growth.

Since there has been a tradition that the government officials and senior SOEs managers are likely to exchange their positions during their service, this created opportunity for "in-house lobbying".[708] Since the subtle relations between government officials and managers of SOEs, the SOE managers tend to obtain administrative monopoly status through lobbying the administrative officials. Some commentators observed that the frequency of such swap between officials and SOEs senior managers is a significant indicator of the strength of administrative monopoly in an industry.[709]

In terms of legal control, despite the central and local regulations, seeking to prohibit regional protectionism and departmental division, the phenomenon of abuse of administrative monopoly was not overcome because of the contained bureaucratic [710] implementing

[707] For example, the revenue-sharing-schemes between the central and local government, combined with enormous benefits from exercising control over SOEs, has created huge incentives for the local governments to abuse their administrative power, such as to issue anti-competitive decisions in favour of "their" local SOEs, which could contribute a lot to the local GDP.

[708] Yong Guo & Angang Hu, 'Administrative Monopoly in Economy Transition in China', China Institute for Reform and Development, available at: http://www.chinareform.org/publications/reports/200206/t20020618_111297.htm, accessed in February 2016.

[709] Sheng Hong, Zhao Nong & Yang Junfeng, *Administrative Monopoly in China--- Causes, Behaviour and Termination,* Series on Chinese Economic Research Vol.10 (Unirule Institute of Economic 2015) 24.

[710] The bureaucratic nature is mainly illustrated by administrative enforcement of the administrative monopoly, which confers powers to tackle such behaviour to the superior authority of the defending authority by ordering the latter to stop the relevant behaviour. In such enforcement of administrative monopoly by superior authority, it is difficult for superior

mechanisms against the administrative monopoly, which has proved ineffective in practice.

Therefore, the ubiquity of administrative monopoly in China is the result of a mixture of economic transition priority; bureaucratic inertia and weak legal control.

2.2 The Relevant Legislation on Administrative Monopoly and its Enforcement in China

2.2.1 The Legislation prior to the AML

Before the adoption of the AML in 2007, attempts to regulate administrative monopoly have been laid down since the 1980s when China started its economic reform progress. For instance, the 1980 Temporary Stipulation of the State Council on the Promotion and Protection of Socialist Competition[711]; the Anti-Unfair Competition Law in 1993[712]; the 2001 Regulation on Prohibiting Local Blockages in Market Economic Activities.[713] In addition to these national-level regulations, there were lots of local and departmental regulations, seeking to prohibit regional protectionism and departmental division.

Despite these endeavours, the phenomenon of abuse of administrative monopoly was not overcome. A common feature of these early regulations concerning administrative monopoly, was that they contained very few effective implementing mechanisms against the administrative monopoly, particularly the private enforcement mechanism.

Among the above-mentioned legal documents, the Anti-Unfair Competition Law 1993, which is superior in legal hierarchy to other regulations, is regarded as a serious attempt by the central government to eliminate the abuse of administrative monopoly.[714] However, even in this serious effort, an effective private enforcement mechanism was not a feature. The provided

authority to keep neutral in dealing with the dispute involving their subordinate department partially because of superior authority's interest in protecting a particular local business in question.

[711] Article 6 of the Temporary Stipulation (国务院关于开展和保护社会主义竞争的暂行规定) is aimed to break local blockade and department division, which are the main forms of administrative monopoly.

[712] Article 7 of The Anti-Unfair Competition Law 1993 generally prohibits abusive behaviour of the administrative power, such as the illegal designation of specific undertaking, regional protectionism.

[713] The Regulation (关于禁止在市场经济活动中实行地区封锁的通知) prohibits any regional blocking behaviour undertaken by local government under market economy.

[714] Thomas K. Cheng, 'Abuse of Administrative Monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015) 140.

administrative enforcement measures[715], were not severe enough to achieve a sufficient deterrent effect. Therefore, the antitrust damages action against the administrative monopoly is needed to achieve not only the compensation goal, but also to some extent the relevant deterrent effect.

It is assumed that above mentioned deficiency in enforcement mechanism provided by the Anti-Unfair Competition Law 1993 has triggered the inclusion of administrative monopoly in the prohibitions of the AML, but also at the same time this has plagued the AML![716] Although the provisions on administrative monopoly were eventually adopted in the AML after hot debate on the treatment of it within the AML, the ineffective administrative penalty measures, and more importantly, the lack of antitrust damages action, rendered the AML a tiger without teeth[717], especially in terms of regulation of administrative monopoly.

2.2.2 The Substantive Rules on Administrative Monopoly in the AML

As mentioned above, Chapter 5 of the AML, is devoted to the prohibition of abuse of the administrative monopoly. As to whether the administrative monopoly should be regulated by the AML, there was a hot debate among the scholars and legislators during its drafting process.

Some commentators took the view that the administrative monopoly was not a genuine competition issue, so it should not be dealt with by competition law.[718] Taking the US as an example, these commentators argued that the issue of administrative monopoly is a constitutional issue governed by the Commerce Clause of US Constitution.[719] Thus the

[715] For example, the confiscation of the illegal income, and fines. See Article 30 of the Anti-Unfair Competition Law.
[716] Thomas K. Cheng, 'Abuse of administrative monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015) 142.
[717] Changqi Wu & Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ August 2012, Volume 41.
[718] Shi Ji chun, 'Two Fundamental Issues Concerning the Concept and Subject of the AML', Chinese Antitrust Law Research, People's Court Press 2001, 166; also see Huang Yong & Deng Zhisong, 'Controlling Administrative Monopoly as Character of China's Anti-Monopoly Law', Law Journal, Issue 7, 2010, 50-53, available at: http://www.competitionlaw.cn/info/1110/22518.htm, accessed in January 2016.
[719] Article I, Section 8 of the U.S. Constitution provides the Congress with the power to regulate the commerce among the States. The Commerce Clause has been regarded as the dormant commerce clause as it implies the prohibition of states laws and regulations which discriminate against interstate commerce. Also see Thomas K. Cheng, 'Abuse of administrative monopoly in China', in Josef Drexl and Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015) 135.

administrative monopoly issue in China should be solved by constitutional reform. Some scholars even argued that administrative monopoly is the outcome of systematic failure, and it can be solved only through deepening economic and political system reform, rather than by legal measures.[720]

In contrast, other legal scholars insisted that the AML is the best vehicle to deal with the anti-competitive behaviour of the administrative monopoly[721], because it has same effect of restricting or distorting competition in the market, whether committed by public or private anti-competitive behaviour. It is examined that taking anti-administrative monopoly as an objective of competition policy is an important characteristic of the AML. Because administrative monopoly had been formed in the traditional planned economic system, so it is impossible for it to be removed by simply taking administrative measures.[722] Furthermore, some commentators, realizing that inappropriate government intervention has been widespread all over country and has been a top threat to competition and economic progress, assumed that a main goal of the AML was to "break" administrative monopoly, rather than merely limit private anti-competitive behaviour.[723]

After 20-years' heated debate, the AML was finally adopted, including the prohibition of administrative monopoly as a separate chapter into the AML. Because a notion has been accepted in China that the suitable competition policy should be able to break down existing government barriers to free movement, access to the market and growth, and to deter the future barriers and privileges form occurring, especially for developing countries.[724] Although the early drafts of the AML contained tougher control on government-initiated restraints on competition, these tough measures were compromised in the struggling of different interest groups. Therefore, the AML contains some quite basic provisions for control of administrative

[720] Ling Wang, 'Legal Regulation of Administrative Monopoly as Viewed from Chinese Antimonopoly Law', Journal of Politics and Law, Vol.2, No.4, December 2009.
[721] Wang Xiaoye, 'Rethinking the Issue of Administrative Monopoly', 2014, available at: http://www.competitionlaw.cn/info/1122/22417.htm, accessed in January 2016.
[722] Zhang Shouwen & Yu Lei, *Market Economy and New Economy Law* (Beijing University Press 1993) 357.
[723] Yong Huang, 'Pursuing the Second Best: History, Momentum, and Remaining Issues of China's Anti-Monopoly Law', 75 Antitrust Law Journal, 2008, 117-120.
[724] Eleanor M. Fox, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries', in Josef Drexl, et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012) 275.

monopoly.

Generally speaking, Chapter 5 of the AML, titled "prohibition of abuse of administrative powers to restrict competition", aims to prevent government agencies from abusing their power to intervene in competition, especially the trade between regions as well as the business within certain sectors. It employs 6 articles to impose a series of negative duties on government agencies.[725]

However, Article 7 of the AML provides a significant exemption from the Chapter 5 for certain government interventions. It sets out:

"with regard to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries lawfully enjoying exclusive production and sales, the State shall protect these lawful operations of the businesses, and shall supervise and control these business' operation and the prices of these commodities and services provided by these business operators, so as to protect the consumer interests and facilitate technological advance".

So, although the AML intends to include the State-owned Enterprises (SOEs) within its regulation, however, Article 7 of the AML seems to grant the SOEs in strategic sectors exemption from the regulation of the AML.[726] Such an exemption, if interpreted broadly, would be sweeping and would leave a gap in the effectiveness of the AML in regulating administrative monopoly.[727] Therefore, the vague language of Article 7, such as 'lifeline of national economy', 'national security', 'lawfully enjoying exclusive production and sales', needs to be clarified, and narrowly interpreted in the supplementary regulation or judicial

[725] Article 32 prohibits abuse of administrative power by designating certain undertakings for the deal. Article 33 prohibits abuse of administrative through regional protectionism. Article 34 prohibits government agencies' protectionist bidding procedure by imposing discriminatory bidding requirements. Article 35 prohibits discriminatory treatment of non-local undertakings with respect to investment and establishment of branches. Article 36 prohibits government agencies from forcing undertakings to undertake anti-competitive activities. Article 37 prohibits any regulations issued by government agencies with eliminating or restricting effect of competition.

[726] Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.

[727] Jacob S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine', Washington University Law Review, Volume 87 Issue 4, 2010.

interpretation.

In essence, Article 7 poses a question as to how to draw a definitive line between proper State economic intervention and illegal State interference in the competition. This might be addressed by looking into Article 106 TFEU to suggest how to draw a clear distinction between SOEs and government agencies' activities that are essentially *commercial* and should be subject to the AML on the one hand, and administrative agencies which serve public functions and hence should be exempted from the AML on the other hand. A detailed analysis of Article 106 TFEU and its case law which is presented in section 3 is helpful to develop a criterion to distinguish.

2.2.3 The Enforcement Mechanism of the Administrative Monopoly under the AML

2.2.3.1 Public Enforcement of Administrative Monopoly----Article 51 of the AML

Article 51 is the sole implementing mechanism against administrative monopoly provided by the AML. This mechanism inappropriately limits the role of the AML enforcement authorities to making recommendation to the superior authority of the offending agency to discipline the anti-competitive administrative monopolies. Instead, the superior authorities of the administrative agency engaging in administrative monopoly has authority to order the offending agency to correct its abusive behaviour, and levy disciplinary sanction on those directly responsible individuals. [728] Thus, the AML enforcement authorities, for example, the NDRC and SAIC,[729] has no direct enforcement power over the offending administrative monopoly. The existing enforcement mechanism against administrative monopoly is a kind of vertical supervision and inside discipline within the administrative system.

However, the picture is even more bleak: the administrative monopoly enforcement mechanism

[728] Article 51 of the AML provides that where an administrative organ or organization empowered by law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order the agency to make rectification and impose punishments on the directly responsible persons in charge and the other directly liable persons. The Anti-Monopoly Law Enforcement Agency may offer suggestions to the relevant superior authority regarding how to handle the abuse according to law.

[729] See f.n.37.

provided by Article 51 lacks enforceability for three reasons: First of all, the superior authority is not able to sanction the infringing administrative agencies effectively. The superior authority is not an independent and impartial body to deal with administrative monopoly. In China, there have been all kinds of links between the superior authorities and the agencies they oversee. The interests of the offending agencies are usually in line with its higher-level superior authorities. Some of the administrative monopoly even receive support, consent or authority from their superior agencies.[730] Therefore, the superior authority has little incentives to fight against abuse of administrative authority, as some measures benefitting the lower government agencies may also indirectly bring benefits for the superior authority. Hence, it is difficult to rely on superior agencies to make unbiased decision as to the offending administrative agencies.

Second, the investigation and analysis of anti-competitive behaviour needs a great deal of legal and economic expertise. The analysis of administrative monopoly is even more complicated than private anti-competitive behaviour, because the investigation of administrative monopoly not only involves the inquiry into the administrative agency's contested decision, but also may involve private undertakings, for example, the company designated in the case of illegal designation for a specific deal.[731] Most of these administrative agencies are not well equipped in the expertise and personnel to deal with such complex investigation and analysis.

Thirdly, the role of antitrust enforcement authorities in proposing suggestions on handling the administrative monopoly is very limited in practice. The recommendation on handling the administrative monopoly made by enforcement authorities has no legal binding effect on the infringers, which leads to the incapability of enforcement authorities.

So, where the interests of the superior authorities and that of the offending agencies are

[730] The examples are among the administrative monopolies recently intervened by the NDRC and SAIC, like the discriminatory highway tolling system imposed jointly by the Transportation Department, Prices Bureau, and Department of Finance of Hebei Province in 2013. In this case, the SAIC sent an enforcement letter to Hebei provincial government to recommend correcting the discriminatory tolling system imposed by the three government departments. In these administrative monopoly cases, if the NDRC and SAIC have not exercised their recommendation authority, the public would never know them, because of the integrity of the interests of the offending agency and its superior authorities. See Meng Yan Bei, 'The Strength and Weakness of the AML's Approach to Administrative Monopoly', available at: http://www.competitionlaw.cn/info/1024/22950.htm, access on 23-02-2016. Also see Wang Yan, 'Legalization of Government Liability From Perspective of Administrative Monopoly Liability', available at: http://kyhz.nsa.gov.cn/xzxy_kygl/pf/xzxywz/yksInfoDetail.htm?infoid=2296, access on 20-01-2016.

[731] Because any sanctions, like fines, if there does exist according to the AML, imposed on the government agency and the third-party undertaking, should be based on the illegal profits obtained through the abuse of administrative monopoly.

intertwined, it is very difficult for antitrust enforcement authorities to get collaboration from the higher-level authorities. Here is an extreme case, because the competition enforcement authorities -- NDRC, MOFCOM and SAIC—are ministerial-level administrative agencies under the State Council, the enforcement agencies will not be able effectively to enforce the law when the offending administrative agencies are at the same level with the enforcement authorities.[732]

Therefore, the current AML enforcement mechanism against administrative monopoly provided is in essence the reliance on one part of the Chinese bureaucracy to bring enforcement actions against another part of the bureaucracy, which is completely internal, closed, bureaucratic and administrative-dominated. Due to the bureaucratic nature of the public enforcement against administrative monopoly, it is assumed that the enforcing mechanism provided by Article 51 has little deterrent effect over administrative monopolies. Accordingly, it is believed that a neutral judicial mechanism[733] will help to deal with this problem, which is equivalent to the approach taken by most other jurisdictions, like the EU. Particularly, the antitrust damages litigation brought by victims of administrative monopoly not only achieve the compensation goal, but also to some extent contribute to deterrence effect.

2.2.3.2 The absence of antitrust damages mechanism against administrative monopoly

It is observed that the effectiveness of law can be achieved by observing the consequences of its breach.[734] In view of ineffectiveness of the administrative enforcement against administrative monopoly, a question has been raised as to whether there are effective civil remedies for abuse of administrative monopoly. The answer to this question is necessarily based on analysis of provisions which are relevant to antitrust damages action and

[732] See f.n.37. Taking SAIC as an example, as the SAIC is accountable to the State Council, its subordinate divisions must be accountable to provincial and city governments in the administrative hierarchy. Thus, the provincial-level division of the SAIC cannot even effectively make recommendations concerning the action of an administrative monopoly engaged by the administrative agency at the same hierarchy level. Also see Changqi Wu & Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law', Rev Ind Organ, 2012, 41, 133-155.

[733] Among some legal scholars, there has been some criticism that the judiciary in China lacks independence and also falls under the control of the administration under the current Chinses political system, see Thomas K. Cheng, 'Abuse of Administrative Monopoly in China', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015) p.165. Notwithstanding, the independence of the judiciary is improving recent decades in China, thus it is believed that the judicial approach is still a better solution to the abuse of administrative monopoly, compared with the enforcement by any administrative agencies.

[734] Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.

administrative monopoly.

- **Article 50 of the AML and its Judicial Interpretation 2012**

As identified in previous chapters, Article 50[735] is the only provision in the AML pertaining to civil liability for anti-competitive behaviour. There is no doubt that this Article applies to private anti-competitive behaviour. However, it is unclear from the language of Article 50 that it could also apply to administrative monopoly, and whether the right to antitrust damages could extend to its victims.

Therefore, it is necessary to look at its Judicial Interpretation 2012.[736] During its drafting process, some commentators proposed that private parties should be entitled to the right to sue the undertaking designated by an administrative agency (with which the parties are compelled to trade), so as to claim damages.[737] Unfortunately, this proposal was not taken up in the final version of the Judicial Interpretation. So, the Judicial Interpretation 2012 is difficult to have any influence on administrative monopolies.

Moreover, almost all administrative monopoly has a legal document as the protecting umbrella of their anti-competitive administrative behaviour. Even if victims have right to file lawsuit against administrative monopolies, it is difficult for them to obtain proper compensation for their harm without a mechanism challenging the justification of these administrative documents granting the monopoly. Because the plaintiff has to prove that the abusive behaviour of defendant as well as its monopoly status in order to claim antitrust damages. It is very hard to gather sufficient evidence to satisfy the proving requirement.

This has led to the problem that victims by no means obtained the compensation for administrative monopoly in previous cases.[738] It is indeed one of significant weaknesses in the

[735] It provides that business operators that engage in anti-competitive behaviour and cause damage to others, shall be exposed to civil liability according to law.
[736] Provisions on Several Issues concerning the Application of the Law in Trials of Civil Dispute Cases Arising from Anti-Competitive Acts, issued by the SPC in 2012, stipulates 16 general provisions on the antitrust damages action in China. It is referred to as Judicial Interpretation in the text of this chapter.
[737] Consultation Paper for the Judicial Interpretation on antitrust damages actions of the SPC, available at: http://www.china.com.cn/policy/txt/2011-04/26/content_22441632.htm accessed on January 2016.
[738] For example, the *AQSIQ* case in 2008, *Shanxi Joint Transport Group v. Taiyuan Railway Bureau* in 2011, *Shenzhen Siweier Technology Ltd. v. Education Department of Guangdong Province* in 2015.

AML, which need to be reformed urgently.

In order to ensure victims of the administrative monopoly to brings antitrust damages lawsuits before the court, it is suggested that Article 50 should be expressly extended to cover administrative monopoly through further supplementary judicial interpretation. Thus, the consumers and undertakings, as victims, would have an incentive to detect administrative abuse and to enhance the enforcement of the AML against administrative monopoly.

- **The relevant provisions in the Administrative Procedure Law**

The recently amended Administrative Procedure Law[739] offers an approach to litigation for the victim of administrative monopoly. It provides that the victim may bring lawsuit before the court if the administrative agencies abuse the administrative authorities so as to eliminate or restrict the competition in the market.[740] However, the Law generally excludes the administrative rules, regulations and decision, orders with general binding effect issued by administrative agencies from the ambit of actionable administrative behaviour.[741] But the amended Administrative Procedure Law provides an exception to this general rule, which is when suing a specific administrative behaviour, the applicant could request the court to review the normative documents on which the administrative behaviour is based, except for the administrative rules and regulations.[742]

Indeed, the amended Administrative Procedure Law has made great progress in terms of legal review of the administrative documents. This represents the preliminary establishment of legal review mechanism with respect to the administrative normative documents. But the exclusion of the administrative rules and regulations from the scope of legal review is a loophole of Administrative Procedure Law with regard to regulation of administrative monopoly. As

[739] The Administrative Procedure Law was amended in 2014, and the amended Law came into force in 2015.
[740] Article 12(8) of Administrative Procedure Law, it provides that the court would accept the following suitcase brought by the natural person, legal person or other organizations: …(8). The administrative agencies abuse its authorities so as to eliminate or restrict the competition in the market.
[741] Article 13(2) of Administration Procedure Law provides that People's courts do not accept the following lawsuit raised by citizens, legal persons or other organizations: …(2) Administrative rules, regulations or decisions and orders formulated and released by administrative organs that are widely binding.
[742] Article 53 of Administrative Procedure Law provides that Citizens, legal persons or other organizations feeling that a state council department's or local people's government or it's departments' normative document on which an administrative was based is unlawful, they may a review of the normative document when they raise a lawsuit over the administrative act. Normative documents as provided for in the preceding paragraph does not include administrative rules and regulations.

mentioned above, most of administrative monopolies have their own administrative rules and regulations, or even laws[743] serving as amulets to safeguard their monopolistic status. In practice, the administrative monopolies take place usually in forms of administrative rules, regulation, decisions and orders of administrative agencies.

Moreover, the Administrative Procedure Law only provides that the court may disapply the illegal administrative normative documents after judicial review and propose handling suggestion to its enacting authority. Such suggestion has no legal binding effect on the relevant administrative authorities. Most importantly, the Law fails to lay down any damages procedure for the applicant if there is harm caused by administrative monopoly. Therefore, the affiliated judicial review mechanism provided by the Administrative Procedure Law is still ineffective in dealing with lawsuit arising from administrative monopoly and granting damages awards to the victims.

In sum, the previous and current laws fail to effectively curb administrative monopoly partly due to the lack of effective enforcement mechanism, particularly the lack of sufficient remedies to the damage. On the one hand, within the framework of the AML, the current administrative remedy mechanism against administrative monopoly, established by Article 51 of the AML, has overlooked the negative impact of administrative monopoly on the business operators and further the overall competition in the market. This has led to the limitation of the antitrust damages mechanism provided by Article 50, which only applies to commercial monopoly rather than anti-competitive administrative activities.

In addition, as the Judicial Interpretation 2012 removed the provision concerning the designated undertakings' civil liabilities, it is still controversial as to whether the enterprises which benefit from the administrative monopoly, such as the designated enterprise, should be exposed to civil liabilities. A supplementary regulation or judicial interpretation, therefore, needs to be issued to clarify the liability of beneficiary enterprises for the administrative

[743] Some administrative monopolies are even established by the National People's Congress or its Standing Committee, for example, the Power Law, Railway Law and Sports Law.

monopoly, which constitutes a significant part of the antitrust damages mechanism.

On the other hand, the remedy mechanism provided by the Administrative Procedure Law plays very limited role in curbing administrative monopoly. Based on the above analysis, it is assumed that the courts are marginalised in combating administrative monopoly, because the competency of the court cannot cover the most of administrative regulations which is the main form of the administrative monopoly. Even though the rule of reason[744] has been widely used to analyse the private anti-competitive behaviour, especially the possession of monopoly status, the court can only examine whether the relevant administrative action is illegal *per se*, instead of the analysis of the effect of the administrative behaviour in question. Therefore, the strength of court review provided by Administrative Procedure Law is very limited.

3. The EU's Relevant Legislation and its Case Law --- Article 106 TFEU

As identified in the introduction section above, there are similarities between the EU and China concerning the objective of establishing an integrated market, and the framework of regulating State-sourced restraints on competition, based on which the EU's experience and practice as regards controlling the state anti-competitive measures, such as the distinction between the exemptible State restraints on competition and the prohibited state restraints, could provide constructive insights and inspirations for the improvement of anti-administrative monopoly in China.

3.1 The Context of the EU's Regulation of State Restraint on Competition

In the EU, the Member States, more or less, directly or indirectly, have "interfered" in its national economy, though the means and extent of such intervention may vary among the Member States.[745] The means of intervention and its extent has also changed with the shift of

[744] The rule of reason is a legal doctrine used to interpret the Sherman Antitrust Act, one of the cornerstones of United States antitrust law. Recently, the rule of reason has been employed by Chinese antitrust court to analyse some types of the anti-competitive behaviour. Under the rule of reason, the behaviour is only considered illegal when their effect is to unreasonably restrict or distort competition.

[745] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 598.

the Europe's economic policy from nationalization to great liberalization of the respective domestic economies. During this shifting process, the *Costa* case[746] had played a significant role in the pursuit of liberalized economy in the EU. Since this case, there has been a trend in Europe whereby state ownership in most economic sectors has been given up by the Member States: instead the market mechanism has been increasingly relied on to provide goods and services to the public.[747] From the perspective of EU legislation, it is argued that the insertion of Article 119 TFEU[748] marks the change in policy favouring the private over public ownership.[749] As a consequence, a number of enterprises was privatized, and the sectors previously controlled by the State have been opened to market competition. Thus, competition policy has been employed to regulate both public and private undertakings, so as to ensure effective competition in the EU market.

As an inherent objective of EU competition law, establishment and maintenance of the EU internal market requires removing obstacles to the free movement of goods, services, capital and persons.[750] In addition to private undertakings, the States might introduce obstacles through the undertaking to restrict or distort competition. As a consequence of the establishment of the internal market, the increasingly liberalized economy has been proved more efficient and more responsive to consumer wishes than State monopolized economy.[751] Economic efficiency and consumer interest are also values that the Competition Law seeks to protect. Therefore, it is justified that competition law should apply to the state anti-competitive actions, in addition to private restraint of competition.

Due to the sensitive political consideration in terms of regulating the action of sovereign States, the application of competition law to state actions is relatively cautious, compared with the

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[746] Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585. It is the leading case on supremacy of EU law. It concerned nationalization of the Italian electricity industry.
[747] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 598.
[748] Article 119 TFEU provides that all activities of the Member States and the Union shall be conducted in accordance with the principles of an open market economy with free competition.
[749] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, Oxford University Press 2014) 599.
[750] Maria Manuel Leitao Marques & Leonor Bettencourt Nunes, 'Deepening the Freedom of Services Through Pro-Competitive Regulation: The Case of the EU Services Directive', in Josef Drexl & Vincente Bagnoli (eds), *State-Initiated Restraints of Competition* (Edward Elgar 2015)103.
[751] E. Szyszczak, 'Public Service Provision in Competitive Market' (2001) 20 YEL 35,36.

competition regulation of private undertakings.[752] Accordingly, the EU law needs to pay enough respect to proper government action, which can be reflected, for example, in the damages liability imposed on the State, where the applicant has to conduct a serious and sufficient challenge to the alleged state action. In this respect, a criterion has been in place that whether a Member State "manifestly and gravely disregarded the limits" when exercising its discretion.[753] Nevertheless, the intentional discriminatory state measure is still regarded as the actionable abuse.[754]

In addition to the deference to the Member State's sovereignty, the public function of state is another consideration with respect to the competition regulation of State actions. In this regard, there has been a tension between the liberalization and sufficient competition pursued by the Union, and the public interest the Member States seek to protect, for example, the efficient provision of services of general economic interest to its nationals, for instance, the sector of gas, water, electricity and postal service. The competition policy also needs to respect such public duties that the States owe to their nationals. Therefore, a balancing mechanism is needed to prevent the competition policy from hindering the provision of these public services.

Unlike the EU which is composed of independent sovereign states, China is a single unitary nation where the deference to sovereignty of the State is not a necessary consideration with respect to the regulation of administrative monopoly. Due to the superiority of Chinese central government, China could take a more consistent and stricter approach to provincial and regional matters, which could be reflected by less deference to provincial and local agencies. Therefore, the EU' experience in this respect would not serve as useful lessons for China.

However, as mentioned at the beginning, the development of the EU regulation of state restraint is accompanied by the process of privatization of the EU's economy through 1980s and 1990s. Whereas in China, the privatization and liberalization of economy does not mean the complete retreat of state intervention of economy. In this regard, the EU experience could provide

[752] Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law—Cases and Materials*, 2nd edn, CUP,1013.
[753] Joined Case C-46/93,48/93, *Brasserie du Pecheur SA v. Germany (Brasserie du Pecheur)* and *Regina v. Secretary of State for Transport,* [1996] E.C.R. I-1029.
[754] Eleanor M. Fox, 'An Anti-Monopoly Law for China –Scaling the Walls of Protectionist Government Restraints', Law & Economics Research Paper Series Working Paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.

guidance as to how to build a workable legal mechanism to balance the public and private interests in the sectors where there is strong political interference in the privatization and liberalization of economy, in order to determine which state restrains are actionable, which are not in damages actions.

In addition, one of the EU's competition goals[755] are closely in line with the AML, which aims to eliminate the regional protectionism and the establishment of an internal national market in China.[756] Therefore, the substantive rules of the EU concerning assessment and elimination of the anti-competitive state measures are worth referring to by the Chinese legislature.

3.2 The EU Jurisprudence on Regulation of State Anticompetitive Measures---- Article 106 TFEU and its case law

In the EU, the State-initiated restraints that discriminate against or exclude the undertakings or nationals of other Member States so as to distort or eliminate the competition among the Union are expressly prohibited by the EU law. It is regarded as the worst type of economic restraints compared with private anti-competitive behaviour.[757] More importantly, the state-owned enterprises and the undertaking granted with special right or privileges by a state also fall within the scope of competition policy regulation, with the exemption that the anti-competitive behaviour is necessary for provision of services of general economic interests.[758] Such regulation of tstate anti-competitive measures through undertakings is provided mainly by Article 106 TFEU.

It is worth noting that Article 101 and 102 are addressed to undertakings, whereas Article 106 is addressed to the States, specifically, the State measures. The phrase 'State measures' has

[755] Removing the trade barriers and eliminating unfair state intervention in the economy to achieve integration of the EU market has been always, since the economic liberalization, one of the goals of the EU competition policy. Also see Jacob S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine', Washington University Law Review, Volume 87 Issue No. 4 (2010).
[756] R. Hewitt Pate, 'What I heard in the Great Hall of People --- Realistic Expectations of Chinese Antitrust', 75 Antitrust L.J 195, 203 (2008).
[757] Eleanor M. Fox, 'Anti-Monopoly Law for China – Scaling the Wall of Government Restraints', Law & Economics research paper series working paper No. 07-27, July 2007, available at: http://www.jstor.org/stable/27897574?seq=4#page_scan_tab_contents, accessed on March 2016.
[758] Article 106 TFEU.

been used in several EU legislative documents other than Article 106.[759] The Commission adopted a definition on state measures in Directive 70/50, which regards "laws, regulations, administrative provisions, administrative practices, and all instruments issued from a public authority, including recommendations" as state measures.[760] It is worth noting that such measures do not necessarily have legal binding effect, for example, the recommendation. The CJEU reiterated this point in case *Buy Irish*, in which the Court held that the measures do not have to have binding effect.[761] Moreover, the Court in *France v. Commission*, held that the measures do not concern the activities of private undertakings, they only concern the state actions which assign or authorize them.[762]

Regarding the anti-competitive state measures, the CJEU has well developed the key elements of the general prohibition provided by Article 106(1), such as the "public undertaking", "undertaking granted exclusive or special rights", "state measures". The CJEU's interpretation has made this article more enforceable in practice. Therefore, the jurisprudence concerning this general prohibition of the state anti-competitive measures could provide some insights and aspiration for the improvement of administrative monopoly damages action in China, especially the further interpretation of article 7 of the AML.

However, the exemption provided by Article 106(2) give helpful guidance for the application of the administrative monopoly rules in the AML only in limited aspects. Specifically, Article 106(2) provides an exemption from the competition rules for the undertakings entrusted with provision of the SGEI.[763] Whereas under the AML, *there is no equivalent concept* of the SGEI. The similar exemption provided by the AML is based on public interests, such as "lifeline of national economy", "national security", "customer interests" and "technological advance".[764] Although the SGEI is not a consideration when determining whether a state monopoly could be exempted from the AML, the approach taken by the CJEU to determine whether the

[759] For example, Article 4 TEU, Article 34 TFEU, Directive 70/50.
[760] Directive 70/50 on the Abolition of Measures Which Have an Effect Equivalent to Quantitative Restrictions on Imports and are not Covered by Other Provisions [1970] OJ Spec. Ed.17.
[761] Case 249/81, *Commission v. Ireland* [1982] E.C.R. 4005, para.28.
[762] Case C-202/88, *France v. Commission* [1991] E.C.R. I-1223, para.55.
[763] Article 106(2) TFEU.
[764] Article 7 of the AML.

immunity should be granted is worth referring to by the Chinese courts.

Thus, the following part will focus on the discussion of Article 106(1) TFEU, as the case law concerning it is worth referring to by the Chinese courts in dealing with administrative monopoly, as well as the approach to the grant of exemption under Article 106(2).

3.2.1 The General Prohibition of State Restraints on Competition under Article 106(1) TFEU

As a part of the EU competition policy, Article 106 TFEU specifically deals with the relationship between competition law and State measures. It addressed the application of EU competition law to State measures through "public undertakings"; undertakings "granted special or exclusive rights" and undertakings providing "service of general economic interests".[765]

It generally prohibits the state anti-competitive measures realized through undertakings, but it had no independent application and could apply only in combination with other provisions of the Treaty, for example, Article 101 and Article 102 TFEU.[766] The case law of the CJEU provides some categories of such state behaviour. In *Höfner*, the judge held that any State measure that creates a situation in which a public undertaking cannot avoid infringing Article 106 is the breach of competition law.[767] According to previous case law, such measures has been summarised into the following categories by some scholars:(1) inability to meet market demands, (2) the cumulation of rights conferred on an undertaking create a conflict of interest, (3) the extension of exclusive rights without effective justification, (4) pricing abuse, (5) refusal to supply, (6) inequality of opportunity and distortion of competition.[768]

As to what activities of the undertakings mentioned in Article 106 TFEU fall within the scope of the prohibition, the key issue is to determine whether the activities in question are economic.

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[765] Article 106 TFEU.
[766] Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, EU:T:2012:448, [2012] 5 C.M.L.R. 21; also see Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19
[767] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979.
[768] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (5th edn, OUP 2014) 628-630.

The ruling in *Höfner* clarified that the any entity engaged in economic activities should fall within the scope of the competition law, regardless of its legal status, or the way it is financed.[769] In contrast, the non-economic activities conducted by entities will be excluded from the ambit of competition law, regardless of whether the entity is governed by public law or is profit-making.[770]

3.2.2 Public Undertakings

According to Article 106(1) TFEU, there are two types of undertakings falling within the prohibition of this article, which are "public undertakings", and "undertakings granted special or exclusive rights". The definition of these undertakings could be found in Commission documents. As to public undertakings, the Commission Transparency Directive[771] provides a clear definition, under which, the public undertaking is generally the undertaking directly or indirectly controlled by public authorities through ownership, financial participation, and contractual or structural relationship.[772]

In addition, the Commission and CJEU further developed the concept of public undertaking in a series of cases. In a case of *Greek Lignite and Electricity Market*[773] before the Commission, the PPC used to be completely state-owned company established by the Greek law in 1950. In 1996 the PPC was transformed into a shareholding company with only one shareholder, Greece. During the following decades, Greece sold some of its shares, but Greece still held 51.12% of the voting share of the Company, which was determined by the Commission to be controlled

[769] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979, para.21.
[770] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, Oxford University Press 2014) 600.
[771] Commission Directive on the Transparency of Financial Relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L 318/17.
[772] Article 2(b) of the Transparency Directive defines that the public undertaking means any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

(i) hold the majority part of the undertaking's subscribed capital; or

(ii) control the majority of votes attached to the shares issued by the undertakings; or

(iii) can appoint more than half of the members of the undertakings' administrative, managerial or supervisory body.

[773] Case COMP/38.700, *Greek Lignite and Electricity Markets*, [2009] 4 C.M.L.R. 11, para.5.

by Greece. Hence, the PPC is a public undertaking.

In another case which concerned a Greek electricity company, *Dimosia Epicheirisi Ilektrismou (DEI)*, the Court held that this company was a public undertaking with exclusive rights to produce, transport and supply electricity in Greece, because the Hellenic Republic still hold 51.12% of the shares in DEI, even though the DEI has been transformed into a company limited by shares. According to Greek law, the State's shareholding in the capital of the applicant may not in any case be lower than 51 per cent of the shares with voting right.[774]

In addition to such public undertakings as SOEs, it has been well established that public agencies engaging in economic activities might be regarded as undertakings.[775] Advocate General Jacobs further examined that "undertaking" is a relative concept in that a public agency is regarded as an undertaking for its economic activities, while other non-economic activities of the agency shall fall outside of competition law.[776] Therefore, the key to identify whether a public entity is an undertaking within the meaning of Article 106, lies in the economic nature of its activities in any given market.

3.2.3 Undertakings Granted Special or Exclusive Rights

As to the undertakings granted exclusive or special rights, it should be noted that "exclusive rights" and "special rights" are two different types of monopoly right. Therefore, it is wise to define these rights separately, in order to obtain a full understanding of the undertakings conferred with special or exclusive rights.

In dealing with the undertakings granted special or exclusive rights, the Court first needs to define "special" or "exclusive rights". As to exclusive rights, they can be identified where a monopoly status is granted by government to one undertaking for a particular economic activity

[774] Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, [2012] 5 C.M.L.R. 21; also see Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19.
[775] Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] E.C.R. I-8089; Case C-41/90, *Höfner and Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979.
[776] Opinion of Advocate General Jacobs, in Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] E.C.R. I-8089, A72.

on the exclusive basis.[777] For example, in *Höfner*[778], an employment recruitment right granted by the German government to a public employment agency was regarded by the Court as an exclusive right. In many other cases, the sole right conferred on a sole undertaking by government has also been ruled by the CJEU be an exclusive right.[779] Therefore, it is clear from the above cases, that the scenarios with exclusive rights only involve one undertaking.

But the CJEU took different position in case *FFAD*.[780] In this case, the CJEU regarded the three companies granted recyclable waste collection right in Copenhagen as undertakings with exclusive rights. Realizing that the TFEU gives no definition of "exclusive rights", the Court drew from previous case law that, for the purposes of Article 106 TFEU, they are to be understood as rights granted in an exclusive manner, by a measure adopted by a State to a limited number of undertakings in all or part of the national territory.[781] Therefore, it is assumed that the key to define exclusive right is the exclusive manner in which the right is conferred, as well as the limited number of undertakings who may be entitled to exercise that right.

Compared with exclusive rights, it is much more complicated to define special rights in the cases of the state monopoly. It is worth noting that the EU Commission has attempted to define the special rights in the field of telecommunication in order to liberalize telecommunication market of the EU. In the Commission's Directives, a definition of special rights was provided so as to force the withdrawal of State measures granting special rights to telecommunication terminal equipment and services.[782] Some Member States challenged the Commission's directives before the Court of Justice.[783] The Court then annulled the provisions in the directives concerning withdrawal of all special rights, holding that the definitions provided by

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[777] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 605.
[778] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979.
[779] For example, the sole right to operate on a particular air route in case C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekampfung Unlauteren Wettwerbs Ev* [1989] E.C.R. 803; the sole right to supply uploading service at a port in case C-179/90, *Merci Convenzionali v. Porto di Genova* [1991] E.C.R. I-5889; the sole right to receive and manage the contributions made under a compulsory social insurance scheme in case C-437/09, *AG2R Prevoyance v. Beaudout* [2011] E.C.R. I-973.
[780] Case C-209/98, *Entreprenorforeningens Affalds (FFAD) v. Kobenhavns Kommune,* [2000] E.C.R. I-3743.
[781] Ibid., para. A53.
[782] The Commission Directive 88/301 on competition in the markets in telecommunications terminal equipment, [1998] OJL 131/73, Article 2; the Commission Directive 90/388 on competition in the markets for telecommunications services, [1990] OJL 192/10.
[783] For example, Case C-202/88, *France v. Commission* [1990] E.C.R. I-1223; Case C-271,281 and 289/90, *Spain, Belgium& Italy v. Commission* [1992] E.C.R. I-5833.

these directives are too general to specify the type of the special rights which are contrary to the Article 106 TFEU.[784]

Due to these challenges from the Member States, the Commission refined its definition on special rights in the field of telecommunications in the Directive 94/46.[785] It highlights that special rights are rights granted through any legal, regulatory or administrative instruments to a limited number of undertakings which are determined on the discretionary and subjective ground.[786] It is assumed that this definition also applies to other fields other than telecommunications.[787]

The CJEU also expressed its view on the definition of special or exclusive rights. In *R. v. Secretary of State for Trade and Industry*[788], the Court, in order to clarify the several Directives in the field of telecommunication, gave a definition covering both special and exclusive rights. Since this definition was designed to apply liberation process in the field of telecommunications to the unjustified grant of rights, it should be adjusted to apply to Article 106 for the purpose of determining the scope of application of this Article. Therefore, the suitable definition of special and exclusive rights is to define the rights as granted by the authorities of a Member State to one undertaking or a limited number of undertakings, which substantially affect the ability of other undertakings to conduct economic activity in the same relevant market.[789]

In *Ambulanz Glockner*[790], the Court of Justice further pointed out that a special or exclusive

[784] Case C-271,281 and 289/90, *Spain, Belgium& Italy v. Commission* [1992] E.C.R. I-5833, para.31.
[785] Directive 94/46 amending Directive 88/301 and 90/338 in particular with regard to satellite communications [1994] OJ L268/15. It defines a special right as one right that was granted by a member state to a limited number of undertakings through any legislative, regulatory or administrative instruments which, within a given geographical area, limits to two or more, otherwise than according to objective, proportional and non-discriminatory criteria, the number of undertakings which are authorised to provide any such service, or designates, otherwise than according to such criteria, several competing undertakings, as those which are authorised to provide any such service, or confers on any undertaking or undertakings otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide that same telecommunication service in the same geographically area under substantially equivalent conditions.
[786] The Commission's statement at the hearing in the Telecommunications Services case, Case C-271, 281, and 289/90, *Spain, Belgium & Italy v. Commission* [1992] E.C.R. I-5833, quoted by Jacobs AG at para. 50 of the Opinion.
[787] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, (5th edn, OUP 2014) 606.
[788]Case C-302/94*, R. v. Secretary of State for Trade and Industry, ex parte British Telecommunications plc,* [1996] E.C.R. I-6417, para. 34.
[789] Opinion of Advocate General Jacobs, in Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] E.C.R. I-8089, para.89.
[790] Case C-475/99, *Ambulanz Glockner v. Landkreis Sudwestpfalz* [2001] E.C.R. I-8089, para.24.

right exists where the protection is conferred by legislative measures on a limited number of undertakings, which may affect the ability of other undertaking to exercise certain economic activities under the equivalent conditions.[791]

In the situation of dominance created by the State, in the earlier case law, e.g., *Giuseppe Sacchi*, Article 106 was interpreted as permitting the grant of special or exclusive rights.[792] Generally speaking, the Court adopted a neutral position as to the existence of such special and exclusive rights. Similarly, the Court further stressed in *Höfner*, that an undertaking granted with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 102, but it is only the *abuse of such monopoly that will constitute the infringement of Article 102 TFEU*.[793]

In *Ambulanz Glockner*, the Court also took a similar position, holding that the mere creation of a dominant position through the grant of special or exclusive rights is not, in itself, a breach of Article106. A Member State will be incompliable with the Article 106 only if the undertaking in question, merely by exercising the special or exclusive rights granted, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuse.[794]

However, with the increasingly economic liberalization in the EU, this is not always the case in the scenario of monopoly created by the State. In *ERT*, the Court took a different approach to interpret the abuse of monopoly within the meaning of Article 106(1). It held that the manner in which the monopoly is *organised or exercised* may infringe competition law.[795] The Court in this case stressed that Article 106(1) prohibits the granting of an exclusive right to transmit to a single undertaking, where the granted right *is likely to create a situation* in which that undertaking is led to infringe Article 102 according to the discriminatory broadcasting

[791] The granting of the special or exclusive rights would lead to the creation of a kind of limited, closed class.
[792] Case 155/73 *Giuseppe Sacchi* [1974] E.C.R. 409, para.14.
[793] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979, para. 28.29.
[794] Case C-475/99, *Ambulanz Glockner v. Landkreis Sudwestpfalz* [2001] E.C.R. I-8089, H7.
[795] Case C -260/89, *Elliniki Radiophonia Tileorassi AE (Ert) (Panellinia Omospondia Syllogon Prossopikou Ert intervening) v Dimotiki Étairia Pliroforissis (Dep) and Sotirios Kouvelas (Nicolaos Avdellas and Others intervening)*, [1991] E.C.R. I-2925, para.11.

policy.[796]

In *Dimosia Epicheirisi Ilektrismou AE (DEI)*[797] case, the Court took a similar approach as that in *ERT* case, and further developed the situations in which the granting of exclusive and special rights itself might be regarded as the breach of competition law. The Court started by recognising the general rule that the undertaking placed in an advantageous position due to State appointment does not normally constitute the abuse of a dominant position. However, in the following reasoning, the Court raised some situations in which the special or exclusive right *itself* could constitute the infringement of Article 106, even if no abusive behaviour is found.

One situation is the creation of inequality of opportunity. As the AG pointed out, the granting and maintaining of such right can be contrary to Article 106(1), where they created a situation of inequality of opportunity between economic operators as regards access to certain market, and allowed the DEI to maintain or strength its dominant position in the Greek electricity market by excluding new entrants from that market.[798]

The other situations developed in *DEI* case include that an undertaking holding a monopoly in a particular market, without any objective necessity, reserved to itself a neighbouring but separate market, thereby eliminating all competition from other undertakings: this too constitutes a breach of Article 106; or if the extension of the dominant position of the public undertaking was the result of a State measure, such a measure constitutes a breach of Article 106 in conjunction Article 102 because the state measure had the effect of favouring the national undertaking by granting it special or exclusive rights.[799]

Therefore, under these circumstances, the grant of special or exclusive rights may be declared illegal *in itself*, even if the privileged undertaking does not abuse its dominant position. It is observed that there has been a trend to impose some limits upon Article 106(1) TFEU through the case law.[800] Through interpretation of Article 106, the Court has been attempting to find a

[796] Ibid., para.38.
[797] Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012] 5 C.M.L.R. 21.
[798] Opinion of Advocate General in Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19.
[799] Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012] 5 C.M.L.R. 21.
[800] Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law—Cases and Materials*, (2nd edn, CUP 2012) 1024.

balance between the goal of the Union to create a competitive market on one hand, and national sovereignty to protect certain sectors from competition for public interests on the other.[801] It is observed that the State measure is illegal if such measure brings the appointed undertakings into a scenario in which they cannot avoid abusing their dominant position. *Höfner*[802] is an example of such situation. Moreover, in some cases, the Court imposed even more limits on State sovereignty, by declaring the grant of special or exclusive right unlawful where *the risk of such abuse exists*, which is illustrated in *RTT* case.[803]

In sum, Article 106 undertaking are usually in a dominant position due to the priority, exclusive or special, conferred by rights granted to them by the state. It is generally recognised that the creation of such dominance itself is not normally an infringement of Article 106(1). However, the case law of the CJEU imposes more limits on this general rule, which means in some situations the mere granting of special or exclusive right itself might be challenged under Article 106.

3.2.4 Approach to the Grant of Exemption provided by Article 106(2)

The underlying rational of Article 106 is to include the state-appointed monopolies within scope of activities prohibited by competition law, with the exemption of performance of particular functions entrusted to certain undertakings, such as provision of general economic interests services, and producing of revenues. This means that the application of competition law shall not hinder the operation of such tasks.[804] Although the exemption is addressed to undertakings, the Member States could invoke it to grant special or exclusive right to undertakings entrusted with such tasks.

As regards the extent to which the competition law should interfere in those undertakings entrusted with such tasks, the position of the CJEU is not always consistent. In the cases before 1993[805], the CJEU took a very strict approach to the grant of immunity to undertakings

[801] D. Edward & M. Hoskins, 'Article 106 TFEU, Deregulation and EC Law', (1995) 32 C.M.L.R. 157.
[802] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979.
[803] Case 18/88 *Regie des telegraphes et des telephones (RTT) v. GB-Inno-BM SA* [1991] E.C.R. 5941.
[804] Article 106(2) TFEU.
[805] For example, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. I-1979; Case C-179/90, *Merci Convenzionali Porto di Genova v. Siderurigica Gabrielle* [1991] E.C.R. I-5009; Case 18/88 *Regie des telegraphes et*

performing such tasks. The Court insisted that although the undertaking is entrusted with such tasks, they still have to comply with competition rules unless they are able to establish that it is necessary for carrying out of such tasks to infringe competition rules[806], alternatively, to show that compliance with competition rules would obstruct it in carrying out its tasks.[807]

The Court changed its approach to Article 106(2) after the *Corbeau* case.[808] In this case, the Court identified that proportionality requirement in effect should be applicable to immunity decision concerning Article 106(2). The question needs to be answered in this case as to the extent to which the restriction on competition is necessary in order to ensure the provision of service of general interests and further to obtain the benefit of economically acceptable conditions.[809] The starting point of the proportionality principle analysis concerning Article 106(2) is the premise that the obligation of the undertaking entrusted with certain tasks to carry out its tasks in conditions of economic equilibrium, and it will be possible to offset less profitable sectors against the profitable sectors, thereby justifying the restriction of competition from other undertakings.[810]

Thus, the application of a proportionality principle to determine the extent to which the restriction of competition is necessary for the performance of certain state-assigned tasks, has developed into two criteria, which are a). the undertaking needs to have economically acceptable conditions; b). the undertaking must be able to perform the tasks under conditions of economic equilibrium.[811] In the situation where the undertakings entrusted with certain tasks cannot perform their tasks under economically acceptable conditions (if the competition from other undertakings is allowed to come in and only select the most profitable parts of the market), the restriction of competition could be justified as being necessary to ensure the performance of the assigned tasks.

However, in *Dusseldorp* case[812] in 1998, the Court came back to its previous strict approach

des telephones (RTT) v. GB-Inno-BM SA. [1991] E.C.R. 5941.
[806] Case C-179/90, *Merci Convenzionali Porto di Genova v. Siderurigica Gabrielle* [1991] E.C.R. I-5009.
[807] Case 41/83, *Italy v. Commission* [1985] E.C.R. 873.
[808] Case C-320/91, *Criminal Proceedings against Corbeau* [1993] E.C.R. I-2533.
[809] Ibid., para.16.
[810] Ibid., para.17.
[811] Case C-320/91, *Criminal Proceedings against Corbeau* [1993] E.C.R. I-2533, para.16, 17.
[812] Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV v. Minister van Volkshuisvesting, Ruimtelijke Ordening en*

to the grant of exemption under Article 106(2). The Court required the Dutch Government to establish that the task by no means could be equally achieved other than by grant of state monopoly. Only if it was proved that the undertaking could not perform its entrusted task, without the grant of state monopoly, could the exemption from the prohibition of competition law be justified.

It is clear from the above-mentioned cases that the application of the principle of proportionality to determine whether the restriction of competition is necessary for carrying out assigned tasks is based on a case-by-case analysis. Nevertheless, the principle of proportionality means that the administrative measures should not cause a restriction of competition from individual undertakings which is out of proportion to the efficient provision of services of general interests, as well as efficient performance of revenue-producing task.[813] In order to apply the criteria developed by the CJEU, the economic analysis should be conducted to determine whether the undertakings have economically acceptable conditions, and whether the undertaking is able to perform its task under conditions of economic equilibrium. Therefore, the examination of whether the compliance with competition law would obstruct the efficient performance of certain tasks deserves complicated economic analysis, whereby the discretion of the Court over the grant of exemption, could be exercised in a consistent and transparent fashion.

3.3 Possible Lessons for China

Although the "public undertaking", "undertaking granted special or exclusive rights" and "service of general economic interests" are the EU concepts, and no equivalent expression could be found in the AML, the CJEU' case law governing state monopoly under Article 106 TFEU could provide significant guidance for China to prohibit the anti-competitive administrative behaviour which are realized through undertakings.

The public undertaking within the EU is referred to undertakings controlled by the State. Such control is normally realized through ownership, or some contractual, financial, or structural

Milieubeheer [1998] E.C.R. I-4075.
[813] Case C-320/91, *Criminal Proceedings against Corbeau* [1993] E.C.R. I-2533.

connection between the State and the undertaking.[814] According to this definition, the SOEs in China are typical types of public undertakings. A significant part of administrative measures in favour of SOEs in China, in effect restricting or distorting competition, constitute an abuse of administrative monopoly.[815] However, the AML lacks effective mechanisms to control the State-sourced anti-competitive measures performed via SOEs. Despite the complicated links between the government and SOEs in China, the antitrust legal measures still could be designed from perspective of private enforcement, to curb the administrative monopoly realized through SOEs, and other privileged undertakings.

In some network industries of China, such as telecommunication, postal services and energy, the State confers special or exclusive rights so as to protect public interests, like consumer interests and national security. By contrast, in the EU, even the undertakings granted special or exclusive rights must comply with competition law: Article 106 provides that the State measures conferring undertakings with special or exclusive rights shall not restrict or distort competition.[816] Moreover, the CJEU's case law concerning the undertaking with special or exclusive rights has enhanced the enforceability of Article 106, in determining whether the State measures imposed on such undertakings are in breach of competition law.[817] In this respect, the AML fails to provide a definition of special or exclusive rights, and a legal test to determine whether the existence of such rights is lawful, as well as what behaviour constitute the administrative monopoly in terms of special or exclusive rights. The CJEU's jurisdiction offers a good model for China to improve its legislation on anti-competitive administrative measures operating in industries granted with statutory special or exclusive rights.

First and foremost, since the Administrative Procedure Law of China only provides very limited types of administrative documents subject to judicial review of the courts, expanding

[814] Article 2(b) of Commission Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L 318/17.; the Commission Communication on Application of Article 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ L 254, 12.10.1993.

[815] Sheng Hong, Zhao Nong & Yang Junfeng, 'Administraitve Monopoly in China—Causes, Behaviour and Termination', Series on Chinese Economics Research, Vol.10, Unirule Institute of Economics.

[816] Article 106(1) TFEU.

[817] For example, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. 1-1979; Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012] 5 C.M.L.R. 21; Case C-475/99, *Ambulanz Glockner v. Landkreis Sudwestpfalz* [2002] 4 C.M.L.R. 21.

the scope of legal review with regard to administrative documents is assumed to be an effective approach to proscribing anti-competitive administrative measures in China. Whereby the antitrust court could review a variety of administrative documents, such as the administrative rules, regulations, decision and orders, at national, provincial or local levels, which are connected with public undertakings or privileged undertakings.

Like the EU, the strict prohibition of administrative monopoly has arguably been balanced by the exceptions likely to be granted by Article 7 of the AML. But the exemptions in Article 106(2) TFEU and Article 7 of the AML are based on different requirements. Under Article 7, the state control and regulations take place in the industries where the lifeline of national economy and national security are concerned, and the monopoly status or privileges are granted for purposes of consumer interests and technological advance.[818] The lack of definition as to these key words, such as lifeline of national economy, national security, and technological advance, has led to the grant of the monopoly status in the industries where the lifeline of national economy or the technological advance are not quite relevant, like the sports industry. Whereas in the EU, although the TFEU fails to provide a definition of SGEI based on which the exemption could be granted, the EU Court and the Commission has considered some activities as SGEIs, for example, certain postal services, health services, electricity distribution and waste management. Nevertheless, the CJEU has never expressly defined a certain activity as SGEI, and the exemptions on the grounds of SGEI has been always base on case-by-case analysis.

Similarly, the grant of monopoly status or privileges in given industries under Article 7 might change over time according to the changes of some factors, such as the economic structure and technological advance. Therefore, it is proposed that a definition on the key terms of Article 7, such as “lifeline of national economy”, “national security” and “technological advances”, should be laid down strictly by judicial interpretation, in order to provide workable criteria based on which the grant of certain monopoly status or privileges could be exempted from the AML. More importantly, a dynamic approach should be taken to limit the scope of activities

[818] Article 7 of the AML.

relevant to lifeline of national economy or national security, for example, by providing non-exhaustive list of such activities, because the activities which are assumed to be exempted today from the AML might be considered differently in the future. Thus, further judicial interpretations might be needed to adjust the scope of the exempted activities in certain industries according to changes of factors, such as economic structure and technological advances.

Although requirements according to which the exemption could be granted to the State monopoly under Article 106(2) TFEU are different from that of the AML, the method of analysis as to whether the immunity has been granted justifiably is worth referring to by the court of China. The approach of the CJEU to granting exemption under Article 106(2) is in effect the principle of proportionality, which means that the restriction of competition in the relevant market must be *necessary and proportionate for the purpose of the efficient performance of certain tasks entrusted to the public undertakings, undertakings with special or exclusive rights*.

In this respect, the grant of monopoly status in China is determined relatively arbitrarily by administrative agencies. Although Article 7 of the AML provides some exceptions from compliance with competition law, for example, national security, technological advance, and consumer interests[819], on the other hand, the AML lacks a criteria or benchmark to assess whether Article 7 could be applied to the administrative monopoly in question. Therefore, a workable test, such as proportionality test, is needed to analyse the grant of administrative monopoly under Article 7 in a certain and transparent way.

As examined above in section 3.2.4, the CJEU's approach to proportionality test has not been always consistent in its previous State measure cases, which has been reflected in its strict approach taken in *Höfner*[820] and *Dusseldorp*[821] case, whereas a more flexible approach taken in cases like *Corbeau*.[822] Nevertheless, the CJEU's case-by-case analysis could provide some

[819] Article 7 of the AML.
[820] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. 1-1979.
[821] Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] E.C.R. I-4075.
[822] Case C-320/91, *Criminal Proceedings against Corbeau* [1993] E.C.R. I-2533.

inspirational points for Chinese courts to evaluate whether the monopoly status is properly granted to certain undertakings.

With regard to Article 7 of the AML, it is proposed that the following lines be added to the text of this article: the state monopoly is *necessary* for the industries which affect the lifeline of national economy and national security; and the state monopoly is *proportionate* to the objectives of safeguarding consumer interest and promoting technological advance.

Furthermore, applying proportionality test to the Article 7 is subject to a two-step analysis: first, whether the causal relationship could be established between the state monopoly and the objectives of public interests, such as lifeline of national economy, technological advance and protection of consumer interest; second, whether there are other less restrictive measures which could be taken to achieve the objectives.

4. Proposals for Improvement of Damages against Administrative Monopoly under the AML—from a substantive perspective

4.1 The Legal Basis of Antitrust Damages Action against Administrative Monopoly

As examined in previous chapters, Article 50 of the AML serves as a legal basis of antitrust damages action in China.[823] The significant issue regarding damages for competition law breach by administrative monopoly needs to be dealt with by a judicial interpretation, because Article 50 is too general to provide a clear signal that the victims of administrative monopoly have right to damages. Regrettably, also the Judicial Interpretation 2012, as a supplementary document to Article 50 of the AML remains silent as to whether Article 50 applies to abuse of administrative monopoly.

In comparison with the EU, Articles 101 and 102 TFEU produce direct effects in relations

[823] It provides that the undertakings that engage in anti-competitive behaviour and cause damage to others, shall bear civil liability.

between individuals and create rights for the individuals concerned, which therefore, the national courts must safeguard.[824] In *Höfner*, since Article 102, which has direct effect, was infringed, the claimant was able to claim in the German court that the German law breached Article 106(1), and further claim damages for the abusive behaviour. Therefore, Article 106, in conjunction with Article 101 and Article 102, serves as legal basis of the damages litigation for state-appointed monopoly.

In contrast, Article 50 of the AML and its Judicial Interpretation 2012 fails to state that the antitrust damages litigation against a State-appointed monopoly could be filed before the Chinese courts. Therefore, a direct way to this problem is to further interpret Article 50 to extend its damages mechanism to the administrative monopoly. In that case, the harmed undertakings and consumers would have incentive to detect administrative monopolies, so as to improve the enforcement of competition law against administrative monopoly. More importantly, it is assumed that a Judicial Interpretation is needed to apply the damages litigation against the anti-competitive administrative monopolies by adding the government agencies into the scope of Article 50 of the AML under certain circumstances, whereby provide the legal basis of damages in respect of the anti-competitive action of an administrative monopoly in China, and further enhance the AML enforcement mechanisms against administrative monopoly.

4.2 The Undertakings which are Liable for the Antitrust Damages Payment

As to whether the designated undertakings or beneficiary undertakings should accept the imposition of compensation liability, it was initially proposed in the draft of the Judicial Interpretation 2012 that the private parties should have right to sue the undertakings designated by an administrative agencies with which the parties were compelled to deal, so as to recover damages.[825] This draft article sent the public a clear signal that the designated undertakings involved with the administrative monopolies could be liable to compensate for losses caused

[824] Case C-453/99,*Courage v Crehan,* [2001] E.C.R. I-6297.
[825] Article 6 of the Consultation Paper 2011drafted for Supreme People's Court's Judicial Interpretation on antitrust damages actions, available at: http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm accessed in June 2017.

by administrative monopoly. However, this article was removed from the official version of the Judicial Interpretation 2012. Therefore, Judicial Interpretation 2012 keeps completely silent on the right to sue for antitrust damages arising not only from the action of an administrative monopoly, but also is silent on the liability of the undertakings designated by the administrative monopoly.

To answer the question of whether the protected or privileged undertakings should be responsible to compensate for the harm arising from administrative monopoly, it is foremost to look into the basic requirements of filing antitrust damages litigation. To file damages litigation before the court, it is basically required to provide evidence to prove that 1. The existence of administrative monopoly behaviour; 2. The damage suffered by the victim; and 3. the causal relationship between the violation and the damage.[826]

Chapter 5 of the AML provides a series of prohibitions of abuses of administrative powers to restrict competition.[827] Most of these abusive administrative measures emanate from protectionism. Since these protectionist measures are realized either through the designated undertakings or local undertakings under the protection of local government, this means these measures cause harm to competing undertakings via these favoured undertakings. In other words, the protected or designated undertakings involved in the administrative monopolies cause harm to other undertakings.

Moreover, these privileged undertakings benefit from the unlawful administrative measure by way of excluding rival undertakings. In return, the offending administrative agency also benefits in the form of the contribution of the privileged undertakings to the local GDP. Such "win-win" scenario has been favoured by some administrative agencies and their local undertakings, especially SOEs. Thus, in order to achieve the "win-win", there have been to some extent conspiracy and collusion between administrative agency and undertaking in terms

[826] The Civil Procedure Law of China provides three basic requirements of filing a damages litigation, which are: 1. Illegal behaviour; 2. Damage; 3. Causal link between the illegal and the damage.

[827] The prohibitions include purchase or use of products designated by the government; discriminatory measures imposed on non-local undertakings; exclusion or restriction of the involvement of non-local undertakings in local bidding events; discriminatory treatment of non-local undertakings setting up branches in local markets; compelling undertakings to engage in any anti-competitive behaviour prohibited by the AML; and the adoption of administrative regulations restricting or eliminating competition.

of formulating and implementing of anti-competitive administrative measures. From this perspective, it is assumed that, in terms of administrative monopoly, together with relevant administrative agencies, the protected or designated undertakings also contribute to the harm caused to victim undertakings and consumers.

Another important reason why the undertakings benefitting from administrative monopoly should assume compensation responsibility is because of the deficiency of national compensation mechanisms, under which, where administrative agencies, in violation of the law, abuse their powers to infringe certain legal rights and interests of the persons, undertakings or other organisations, thereby causing damage to them, the victims shall have the right to State compensation.[828]

Therefore, the existing relief mechanism against administrative monopoly was designed purely from administrative perspective, rather than from the angle of competition. It is demonstrated that in the cases where the administrative monopoly causes damage to undertakings, the State compensation action is the only way to redress the losses suffered by victims because the AML is silent on taking damages action against the administrative monopoly. However, the administrative monopoly is of the nature of both the abuse of administrative authority and restriction of market competition. It is assumed that the corresponding relief measures should not be limited to administrative correction, instead, more focus should be on the remedy for the harmed competitors, whereby recovery of effective market competition.

However, under the national compensation mechanism only actual loss of the victim can be compensated.[829] According to the principle of *full compensation* pursued by the AML damages action of China, the award of damages should include not only the actual loss, but also the loss of profits and loss of interest.[830] The compensation provided by the State compensation mechanism is far from full compensation for the losses of the victims caused by the administrative monopoly. Thus, the State compensation provided by Government fails to

[828] Article 2 of the State Compensation law 2013. The State Compensation Law of China was firstly adopted in 1994, then it has been subject to two amendments in 2010 and 2013.
[829] Article 36 of the State Compensation Law 2013.
[830] For discussion on scope of antitrust damages, please see Chapter 3, section 2.1.

satisfy the full compensation principle sought by the AML damages system. A damages mechanism against administrative monopoly within the AML framework is needed to achieve full compensation for the harm caused to undertakings by anti-competitive administrative measures.

Furthermore, as mentioned above, because the majority of administrative monopolies are realized through designated or protected undertakings, whose dominant positions are obtained through abuse of administrative authority rather than market competition, it is assumed that the privileged undertakings gain illegal profits through illegal behaviour of government agencies. In practice, due to the inertia of old centrally planned economy of China, the SOEs mostly inherited certain advantages, and there have been subtle and complicated links between government and undertakings, especially the SOEs. In the cases of abusing administrative monopoly, the government agency tends to collude with the privileged undertakings to block the local market and restrict the competition, whereby benefit from the anti-competitive administrative measure for both of them.

Thus, in order to facilitate the damages litigation against administrative monopoly, as well as to achieve the objective of full compensation, from author's point of view, privileged undertakings and the offending administrative agency are jointly and severally liable for the damages caused by anti-competitive administrative measures. This approach also coincides with the liability incurred to the offending parties of private restraints, as mentioned at chapter 4. This means that a claimant can seek full compensation either from offending administrative agency or privileged undertaking, or both of them.

4.3 Improvement of Enforceability of Article 7 of the AML

Under the AML, State-owned industries relevant to the lifeline of national economy and national security; and industries with statutory exclusive production and sales; are protected from market competition, with the aims of consumer interests' protection and technological advances.[831]

[831] Article 7 of the AML.

This is indeed a powerful exemption for the administrative monopoly provided by Article 7 of the AML. It serves as criteria for assessment of the whether the existence of administrative monopoly itself is lawful. But this criterion is full of ambiguity and lack of enforceability, not only because the AML fails to provide a clear definition of the key terms[832], but also because the approach to granting exemption is absent in the AML. Therefore, the possible result of applying this Article is to exclude *any* State-owned companies that can be plausibly considered to be operating in an important industry from market competition, as long as the grant of exemption could conceivably protect consumer interests and boost technological advances.

In this respect, the lesson from the EU experience in the grant of exemption under Article 106(2) TFEU, which has been well developed by the CJEU, could provide a solution to the lack of enforceability of Article 7 of the AML. The exemption from competition rules for certain undertakings can be granted, but based on different reasons from those of the AML. The EU's experience demonstrates that the restriction of competition can be justified where such is necessary for the provision of SGEI under economically accountable conditions as well as carrying out of other assigned asks.

With regard to the requirements based on which the exemption could be granted, Article 7 of the AML and Article 106(2) TFEU provide them differently. In comparison, the SGEI is actually an economic concept, and the legal and economic approach has been taken by the CJEU to analyse whether a specific activity is SGEI or not.[833] In contrast, the key terms of Article 7, such as "lifeline of national economy" and "national security", to some extent serve political purpose, and entails sovereignty functions of the state in economic and security matters. Therefore, the proper solution is that the definition of industries affecting "lifeline of national economy" and "national security" is left to the interpretation of legislature[834], namely the National People's Congress Standing Committee.

Since Chinese economy is still at the stage of economic transition, and the foundation of the

[832] For example, "lifeline of national economy", "statutory exclusive production and sales".
[833] See Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. 1-1979; Case C-320/91, *Criminal Proceedings against Corbeau* [1993] E.C.R. I-2533; Case-160/08 *EC v. Germany ambulance* [2010] E.C.R. I-3713.
[834] In China, both the legislature and the SPC have authority to interpret laws.

national economy is state-controlled economy, where the SOEs exist substantially in the market. The definition of industries which affect lifeline of national economy and national security has been a legal and necessary vehicle of Chinese central government to intervene in the economy. In order to avoid arbitrary grant of monopoly status to certain industries, it is proposed that a further interpretation concerning Article 7 is needed to define the scope of the industries affecting lifeline of national economy and national security, to which proper monopoly status could be granted.

Although the EU concept of SGEI can hardly be transplanted to the AML at the current stage of economic transition in China, the approach taken by the CJEU to assess whether the grant of exemption to some State measures for carrying out SGEI was justified, which is proportionality test, is worth referring to by Chinese court in the review of anticompetitive administrative measures.

To apply proportionality test to analysis of administrative monopoly in Article 7, in addition to the interpretation of the key terms, like "lifeline of national economy" and "consumer interest", an amendment to Article 7 is needed, which is *the administrative monopoly in certain industries is significant and necessary for purpose for lifeline of national economy and national security, and is proportionate to the achievement of consumer interest and technology advances.*

In applying this test, two issues need to be examined by the court. First of all, a question needs to be answered as to whether there is causal relationship between the anticompetitive administrative measure and achievement of the public interests protected by Article 7, for example, the lifeline of national economy, national security and consumer interest. Second, the court needs to evaluate whether less restrictive measures would not achieve the objectives, in order to make it clear that the administrative measure in question is necessary and proportionate to the achievement of the above mentioned public interest.

At last, the author proposes that Article 7 of the AML should be clarified that although the State-owned industries concern national security and lifeline of national economy, they still have to comply with competition rules, *unless* they are able to establish that it is necessary and

proportionate to the achievement of consumer interests and technological advance; or alternatively, that exception is necessary where the compliance with competition rules would undermine these public interests.

5. Legislative Proposals from a Procedural Perspective

5.1 The Necessity of a "Two-step" Procedure

As examined above, the right to damages could be exercised by the victims of the administrative monopoly through the extended application of Article 50[835] of the AML to expressly cover administrative monopoly and a supplemented Judicial Interpretation. In practice, the right to damages has not yet been properly exercised in recent anti-administrative monopoly cases. A fair and transparent procedure is needed to guarantee the realization of right to damages.

In *Siweier Tech.Co.* case[836], Guangdong Education Department was sued for the illegal designation of a particular brand of software in a national contest. This case was regarded by the public as the first successful case against administrative monopoly in China since the entry into force of the AML, because it was the first time for the jurisdiction to hear such a case which has been accepted by the courts, and the administrative designation of Guangdong Education Department has been ruled as illegal by the High Court.

However, the damages claim of the plaintiff was dismissed by Guangzhou Intermediate Court, and the losses arising from the illegal designation by Guangdong Education Department have not been redressed in legal proceedings. Therefore, from a recovery point of view, this case still represents a "failure" due to the ineffectiveness of the current procedure in cases brought against administrative monopoly.

Another recent high-profile case concerning administrative monopoly was the case of *Guangdong Football Association*.[837] In this case, the Court dismissed the plaintiff's claim

[835] Article 50 of the AML provides that undertakings that implement anti-competitive behaviour and cause damage to others shall take civil liability according to the Law.
[836] *Shenzhen Siweier Tech. Co. v. Guangdong Education Department*, Guangdong High People's Court, (2017), Yuegaofaxingzhongzi No.228.
[837] *Guangdong Yuechao Sports Development Co. v. Guangdong Football Association*, *Guangzhou Zhuchao Sports*

holding that the granting of exclusive rights by Guangdong Football Association was a commercial decision, rather than an administrative behaviour.

Therefore, it is clear from these cases, (*Siweier Tech. Co.* and *Guangdong Football Association)* that the victims of administrative monopolies confront many hurdles, not only in the establishment of abuse by an administrative monopoly, but also in the procedure to obtain damages. Particularly, in terms of procedure, a special enforcement mechanism is needed to guarantee the right to damages.

The current enforcement mechanism, introduced by Article 51 of the AML, is confined only to an administrative procedure.[838] Such administrative procedure in practice has only a very limited regulating effect on administrative monopoly in public enforcement terms. The enforcement provided by Article 51is difficult to serve as an effective preliminary procedure for the follow-on damages action.

Therefore, in order to ensure effective exercising of the right to damages by the victims of administrative monopoly, and further to achieve a full compensation outcome, a 'two-step' procedure is proposed as a proper enforcement mechanism for administrative monopoly damages litigation in China, to include, first, the judicial review of the administrative measure in question, and second, the assessment of damages. Furthermore, since it has been recognised that the judicial review is among the key elements of the appropriate design of antitrust system for developing countries[839], a workable judicial review mechanism needs to be established in order to effectively curtail widespread administrative monopoly in China.[840]

Management Co., Supreme People's Court, (2015), Minshenzi No. 2313. Guangdong Yuechao, a company organising sports contests, filed a litigation against its competitor, Guangdong Zhuchao, which was granted (by Guangdong Football Association) certain exclusive rights to organise, manage football matches in Guangdong Province for the next 10 years, as well as administer intellectual property right for the Guangdong Football Association.

[838] It only allows the superior administrative authority of the offending administrative agency to investigate the alleged anti-competitive administrative behaviour, then order the offending agency to correct its abusive behaviour, and impose disciplinary sanction on the directly responsible officers.

[839] The other elements include, for example, an independent competition authority, reliable institutions, an advocacy role for the authority. See Kovacic, W. 'Institutional Foundations for Economic Legal Reform in Transition Economies: the Case of Competition Policy and Antitrust Enforcement', Chi-Kent L. Rev.,(2006) 77,265; UNCTAD Secretariat, 'The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy'(2010), Geneva, 30 Aug 2010, TD/RBP/CONF.7/3; Eleanor M. Fox, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries', in Josef Drexl et al. (eds), *Competition Policy and Regional Integration in Developing Countries*, (Edward Elgar 2012) 275.

[840] The judicial system of China has been often criticized as lack of independence, because historically the courts are fiscally and administratively dependent on government. But independence of the judiciary has been set as the main goal of the

5.2 The Judicial Review of Anticompetitive Administrative Measures

5.2.1 The Legal Basis of Judicial Review

It is observed that the EU Commission seems reluctant to conduct investigation with regard to the anticompetitive state measures[841], though the Commission is entrusted by Article 106(3) TFEU[842] with power to adopt decisions or directives concerning Article 106 infringements. Compared with the private restraints of Article 101 and 102 TFEU, the Commission has been less active with regard to the enforcement of Article 106 TFEU. This is partly because the Commission has a wide range of discretion on the initiation of procedure provided by Article 106(3), which has been illustrated by the previous cases.[843] This has led to the fact that there have not been so many Article 106 decisions from the Commission. This has a similar effect as that of administrative enforcement provided by Article 51 AML, which led to the ineffective competition authority enforcement of the administrative monopoly.

Therefore, the court has become a favourable arena where the anticompetitive administrative measure could be reviewed both in the EU and China, thought the recent cases have illustrated some weakness in judicial review system of China.

Since administrative monopolies are engaged in by administrative agencies, the litigation against the alleged anti-competitive administrative decision is, according to China's litigation system, subject to the administrative litigation procedure of China. The administrative litigation procedure provided by Administrative Procedure Law of China 2014[844], although generally applying to unlawful administrative behaviour, fails to prohibit all inappropriate

judicial reform of recent years. So, the proposal of two-step procedure is forward-looking in nature, and it represents orientation of the reform on damages procedure against administrative monopoly, with the increasingly independence of the court from corresponding level of government, resulting from the ongoing social, judicial and institutional reform in China.

[841] Jose Luis Buendia Sierra, 'Article 106---- Exclusive or Special Rights and Other Anti-Competitive State Measures', in Jonathan Faull & Ali Nikpay(eds), *The EU Law of Competition*, (3rd edn, OPU 2014).

[842] Article 106(3) provides that the Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[843] Case C-163/99 *Portuguese Airports* [2001] ECR I-2613, para.20, Case C-59/96P *Koelman* [1997] ECR I-4809; Case C-107/95 P Expert Accountants [1996] ECR I-957.

[844] The Administrative Procedure Law was amended in 2014, and it came into force in 2015.

anticompetitive administrative measure, and furthermore fails to provide full compensation for the damaged claimant due to some drawbacks as examined earlier in this chapter.[845]

In addition to the concrete administrative behaviour[846] and few abstract administrative behaviour[847], the recently amended Administrative Procedure Law has added more types of abstract administrative behaviour within the scope of judicial review.[848] So, the tendency is that the behaviour of administrative agencies have been increasingly under the control of the judiciary. Therefore, it is proposed that the scope of administrative measures subject to judicial review needs to be enlarged to include not only the concrete administrative behaviour, but also the abstract administrative behaviour, such as in the forms of order, norm, regulation, legislation, particularly in terms of anticompetitive administrative behaviour, in order to effectively curtail administrative monopoly. This could reflect the recent tendency of Administrative Procedure Law governing more abstract administrative behaviour.

In the EU, whereas, the legal basis of the CJEU's review of the state anticompetitive measures is the preliminary reference mechanism provided by Art.267 TFEU. Due to the direct effect of Article 106 TFEU, it can be directly applied in the national courts. Thus, CJEU's case law relevant to Article 106 has resulted from the preliminary reference cases submitted by the national courts. It is argued that the limitation of the CJEU's review of anticompetitive state measures lies in the reference case from national courts which are sometimes reluctant to refer their cases to the CJEU because some anticompetitive state measures are politically sensitive, and some are closely related to state autonomy.

5.2.2 The Approach to Judicial Review

As to reviewing approach to the anticompetitive administrative behaviour, in China, the

[845] See Section 2.2.3.2 and Section 4.2 of this Chapter.
[846] According to Administrative Procedure Law of China, the administrative behaviour has been categorized into concrete administrative behaviour and abstract administrative behaviour in the context of administrative litigation. The concrete behaviour of administrative agency only has effect on specific person or undertaking, without general binding effect.
[847] The abstract administrative behaviour is generally binding on unspecified subject, taking place in the form of the administrative regulation, decision, rule or order. Normally anticompetitive administrative measures are adopted in the form of abstract behaviour, such as administrative rules, regulation, decisions and orders of the administrative agencies. But very few abstract behaviour could be reviewed by the court under the current administrative litigation system.
[848] See Section 2.2.3.2. A certain type of abstract administrative behaviour has been included into the scrutiny of the court according to recently amended Administrative Procedure Law 2014.

traditional *per se illegal* approach[849] taken by the current administrative litigation mechanism is inappropriate for the review of administrative monopoly, because the analysis of administrative monopoly is focused more on its anticompetitive effect on the market than the formalistic legality which is the subject of the *per se illegal* review.

In order to propose a workable judicial review mechanism for the mounting of effective anti-administrative monopoly litigation in China, it is worth referring to the judicial review system in other jurisdictions, particularly the EU, where the judicial review is a doctrine according to which acts of an administrative body or a court are subject to control by higher courts. A court with judicial review power may invalidate an administrative decision on the grounds that it is incompatible with a statute, or with an EU Treaty, or with a general principle of EU law. One may call judicial review a check and balance on the separation of powers.[850]

In the field of EU competition law, the judicial review mechanism mainly applies to challenges against the EU Commission infringement decisions prohibiting the accused undertakings' alleged anti-competitive behaviour. In the preliminary reference cases relevant to anticompetitive state measure[851], the CJEU has jurisdiction to review whether the accused State measure violated Article 106 TFEU, and whether the alleged state measure could benefit from the protection of Article 106(2). It is worth noting that, among these cases, the CJEU's jurisprudence has been restraint to the substantive issues contained in Article 106, for example, whether the alleged state measure infringe Article 106, and whether the alleged undertaking could be granted exemption. Therefore, the reviewing approach of the CJEU to anticompetitive state measures is to some extent the substantive review model, under the criteria provided by Article 106(1) and (2) TFEU.

The substantive approach taken by the CJEU looks closely into the justification of anticompetitive government actions, for example, whether there is some important public

[849] See section 2.2.3.2 of this Chapter.
[850] Laura Melusine Baudenbacher, 'Aspects of Competition Law Enforcement in Selected European Jurisdictions', E.C.L.R.2016, 37(9), 343-364.
[851] For example, Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. 1-1979; Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012] 5 C.M.L.R. 21; Case C-475/99, *Ambulanz Glockner v. Landkreis Sudwestpfalz* , [2001] E.C.R. I-8089; Case C22-0/06 *Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administracion General del Estado* [2007] ECR I-12175.

interest that the alleged government measure seeks to protect, like SGEI; whether such anticompetitive government measure is necessary for carrying out of the task with public interest character. In essence, this model requires the judge to decide some political issues, for example, what are the important public interests? For this, the substantive model has been criticised that it poses the threat of counter-majoritarian, because arguably the judge has no comparative advantage over the legislature or regulators on such politically sensitive issues as what is public interest, the SGEI in Article 106(2).

It is worth noting that even in the countries where the constitutional law requires judge to determine on a variety of public interests, like racial or gender equality, delivery of free speech, the judgment on public interests in the economic context is still regarded as different matter from the public interests in the area of personal rights.[852] Whereas, in China, there does not exist a constitutional basis for the legal review. It would be particularly difficult for judge to decide on such political legitimacy issue, in other words, to decide one specific public interest is more or less important than another, and to contradict what the regulator and legislature has decided. The main reason is that the courts have been historically dependent on the corresponding level of government both fiscally and administratively.[853] This has constituted a hinder to judicial review of anticompetitive administrative measures for purpose of public interests in Article 7 of the AML.

However, since the orientation of recent judicial reform in China has been to enhance the independence of the court from the administrative agencies[854], which could be reflected in the reform of the specific establishment of litigation mechanism. Therefore, the following solution can be suggested, which is, on the one hand, that the concept of public interest needs to be narrowly defined by national legislature, namely the National People's Congress. Specifically,

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[852] Daniel A Crane, 'Hard Look review of Anticompetitive State Action', in Philip Lowe, Mel Marquis & Giorgio Monti(eds), *European Competition Law Annual 2013-----Effective and Legitimate Enforcement of Competition Law*, (Hart Publishing 2016) 317.

[853] --IP and Law (2011), 367. Also see Mel Marquis, 'Abuse of Administrative Power to Restrict Competition in China: Four Reflections, Two Ideas and a Thought', in Michael Faure & Xinzhu Zhang(eds), *The Chinese Anti-Monopoly Law--- New developments and Empirical Evidence*, (Edward Elgar 2013) 77.

[854] In 2013, Decision of the Central Government on Some Major Issues Concerning Comprehensively Deepening the Reform was adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China. Among other economic, political and judicial goals, ensuring the independence and fairness in the courts, seeking to separate the jurisdiction of the courts from administrative agencies have been established as specific goals of the reform with respect to the judiciary.

the key terms of Article 7 AML, such as the sectors affecting 'lifeline of national economy', 'national security' and 'consumer interest', need to be narrowly interpreted by the legislature. This could avoid the dilemma of the judge in determining what are the public interests relevant to administrative monopoly issues.

On the other hand, the approach to judicial review of administrative monopoly can go beyond the *per se illegality* approach taken by Administrative Procedure Law 2014, and change into more economic analysis of anticompetitive effect. The Guangdong High Court in *Siweier Tech. Co.* case, has taken such *effect-based* approach to the alleged administrative behaviour.

Given the anticompetitive effect of the administrative measure in question, the subject of judicial review is then restricted to analyse, first whether the anticompetitive measure is directly linked to the protection of public interests in Article 7 AML; second, whether there is a different measure which could achieve government regulatory goal without restricting competition; third, whether the restraint of competition is proportionated to those public interests in Article 7, in other words, to assess whether the restrictive measure is *necessary* for the protection of the interest on issue, and whether there is other less restrictive measure which could achieve the same end.

5.3 The Follow-on Antitrust Damages Assessment

Since the follow-on antitrust damages assessment is the second stage of the damages litigation procedure, (following the first phase judicial review of the alleged administrative measures), the competent court should go on to assess the damages where the infringement is established by judicial review. This does not reflect the current judicial practice. For example, the court in *Guangdong Education Department* case[855] while it ruled the designation behaviour of Guangdong Education Department was in breach of the AML, it dismissed the plaintiff's damages claim and failed to further evaluate the claim for damages. The losses caused by the behaviour of Guangdong Education Department was not recovered through resort to the court.

[855] *Shenzhen Siweier Tech. Co. v. Guangdong Education Department*, Guangzhou Intermediate People's Court, (2014), Suizhongfaxingchuzi No.149（广州市中级人民法院一审（2014） 穗中法行初字第 149 号）.

Moreover, more recent administrative monopoly cases considered above[856] also illustrate the flaws of the Administrative Litigation Law in hearing damages litigation concerning administrative monopoly. In these cases, the damages issues have never been considered by competent courts.

Since the full compensation objective pursued by antitrust damages action requires that the victims of both private and public restraint of competition have right to full damages, it is proposed that the follow-on damages assessment should be an integral part of the procedure following judicial review in which anti-competitive administrative behaviour was established by the court. The follow-on damages assessment could follow either the courts judicial review or the competition authority's decision, if the administrative enforcement become effective.

As only direct losses caused by the improper administrative behaviour can be compensated under the current national compensation mechanism[857], which is far from the full compensation goal required by the antitrust damages action, the assessment of damages arising from the behaviour of an administrative monopoly should follow the same damages evaluation rules as that of commercial antitrust damages actions, in terms of the scope of damages; the quantification of damages; and the use of expert evidence to assess the amount of damages; as well as collective redress where mass damage occurs, as discussed in the previous chapters.

Similarly, in the EU, it is worth noting that, in the preliminary reference cases concerning anticompetitive state measures[858], the CJEU's jurisprudence has been limited to the substantive issues contained in Article 106, for example, whether the alleged state measure infringe Article 106, and whether the alleged undertaking could be granted exemption. The CJEU has rarely gone further to rule on the issue of damages arising from these anticompetitive state measures.

However, it is worth noting that there has been greater alignment with the procurement rules

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856 *Shenzhen Siweier Tech. Co. v. Guangdong Education Department*, Guangzhou Intermediate People's Court, (2014), Suizhongfaxingchuzi No.149; *Guangdong Yuechao Sports Development Co. v. Guangdong Football Association*, *Guangzhou Zhuchao Sports Management Co.*, Supreme People's Court, (2015), Minshenzi No. 2313.

857 Article 36 of the State Compensation Law of China.

858 Case C-475/99, *Ambulanz Glockner v. Landkreis Sudwestpfalz*, [2001] E.C.R. I-8089; Case C22-0/06 *Asociacion Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administracion General del Estado* [2007] ECR I-12175; Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R. 1-1979; Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19.

in the competition policy concerning state measures, because Article 106 refers to not only Article 101 and Article 102, but all Treaty provisions, and therefore also to procurement rules.[859] The public procurement provisions and its enforcement may be a good angle from which to look at Article 106, especially the damages arising from the anticompetitive state measures. Therefore, despite the lack of guidance concerning the damages specifically arising from Article 106 TFEU, the damages procedure in public procurement law has well been developed at both the EU and national levels.

Similar to the damages litigation against administrative monopoly in China, public procurement damages litigation in the EU also involves the administrative public sector in procurement contract disputes. In this regard, it is assumed that referring to the damages procedure for public procurement disputes in the EU can provide valuable insight for the improvement of damages mechanisms for the anti-administrative monopoly damages action in China.

Moreover, there rarely had been successful actions for damages in the field of public procurement law in the EU until the Damages Directives have been issued.[860] Specifically, the damages for the infringement of public procurement law was first proposed in Directive 1989/665[861] by the EU Council, then it experienced two revisions, first in Directive 1992/50[862], and second in Directive 2007/66.[863] However, it is noteworthy that although the Directives require that the Member States should adopt rules concerning the damages in the cases of infringement of EU public procurement law, it fails to provide details as to the condition of the award of damages, and with regard to the calculation of the amount of damages which the victims could claim. The reason probably lies in that the EU law leaves some room to the

[859] Philip Lowe, Mel Marquis & Giorgio Monti(eds), 'European Competition Law Annual 2013-----Effective and Legitimate Enforcement of Competition Law', (Hart Publishing 2016) 262.
[860] Steen Treumer, 'Enforcement of the EU Public Procurement Rules: the State of Law and Current Issues', in Steen Treumer and Francois Lichere(eds), *Enforcement of the EU Public Procurement Rules* (DJØF Publishing Copenhagen 2011) 37.
[861] The EU Council Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contract, 89/665/EEC, OJ L 395, 30.12.1989.
[862] The EU Council Directive relating to coordination of procedures for the award of public service contract, 92/50/EEC, OJ L 209, 24.07.1992.
[863] The EU Parliament and Council Directive amending Council Directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 2007/66/EC, OJ L335/31, 21.12.2007.

Member States to lay down such national damages procedural rule.[864] This has complied with the CJEU rulings. In *Spijker* case[865], the Court stressed the procedural autonomy of the Member State, and held that the Member State should lay down relevant criteria in accordance with the principles of effectiveness and equivalence.

In France, according to its administrative litigation procedure, there are two types of actions that the claimant could pursue. One is the annulment procedure, through which the claimant can ask judges to annul an administrative decision.[866] Another is the damages procedure, which allows the court to award damages to the claimant.[867] It is noted that there is no compulsory link between the annulment procedure and the damages actions in French law, because when the claimant goes to court to seek annulment of the tendering award of the public procurement contract, he cannot seek damages at the same time.[868] He can only bring a damages claim by way of a (different) damages procedure.

Similarly, in the German public procurement remedy mechanism, the compliance with the obligations from Directive 2007/66[869], requires the provision of two actions, namely annulment and setting aside of the unlawful procurement decision on the one hand, and a damages action on the other. It is observed that, although the first stage legal review procedure of the unlawful procurement decision has received lots of attention, and has constituted the most important part of the review mechanism in Germany, the damages procedure has been somewhat relatively underdeveloped, which is illustrated by the lack of clarity in some areas of the damages procedure, and the fact that very few procurement damages actions were brought before the German courts.[870] It is assumed that, similar to France, there is also no compulsory link

[864] Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts: Impact assessment report, Remedies in the field of public procurement (SEC (2006) 557).
[865] Case C-568/08*, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe* [2010] I-1265.
[866] It is called '*recours pour exces de pouvoir*' in French. Also see Nicolas Gabayet, 'Damages for Breach of Public Procurement Law—A French Perspective', in Duncan Fairgrieve and Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).
[867] It is called "*recours de plein contentieux*" in French. Also see Nicolas Gabayet, 'Damages for Breach of Public Procurement Law—A French Perspective', in Duncan Fairgrieve & Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).
[868] Nicolas Gabayet, 'Damages for Breach of Public Procurement Law—A French Perspective', in Duncan Fairgrieve & Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).
[869] Council Directive (EC) 2007/66 amending Council Directives (EEC) 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31.
[870] Martin Burgi, 'Damages and EC Procurement Law—German Perspectives', in Duncan Fairgrieve and Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).

between the annulment procedure and the damages procedure in German public procurement remedy mechanisms.

The case in UK is a little different. In implementing the Directives, the breach of public procurement law has been regarded either as tortious breach of statutory duty[871] or breach of contractual obligations.[872] This implementing approach has made the damages claim not as difficult as Germany and France. Furthermore, it is formally provided that the court may award damages to the economic operator harmed by the breach of public procurement rules if the court is satisfied that a breach of relevant duties is established according to the UK Public Contracts Regulation 2009.[873] This has to some extent established a link between the review procedure and the damages award. Moreover, the Judge in *Harmon*[874] emphasized that the damages remedy should be an adequate and deterrent remedy for breach of public procurement rules.

The reason why the damages procedure receive little attention in practice in Germany is partly because the interest of the bidder in a procurement contract dispute is exclusively in pursuing the award rather than the obtaining of damages.[875] In contrast, for the claimant in an anti-administrative monopoly damages action in China, obtaining full compensation is the ultimate objective of bringing the lawsuit under the AML of China, as required by principle of full compensation pursued by the AML damages action. However, the absence of damages mechanism for administrative monopoly has made it difficult to achieve full compensation objective. Therefore, it is the author's submission that, in addition to the extended application of the damages Judicial Interpretation 2012 to administrative monopoly, a "follow-on" linkage between the judicial review procedure (of the administrative measure) and the damages procedure needs to be established by further judicial interpretation in order to give "real teeth" to the damages action against administrative monopoly in China.

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871 Fiona Banks & Michael Bowsher QC, 'Damages Remedy in England &Wales and Northern Ireland', in Duncan Fairgrieve and Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).
872 *Harmon CFEM Facades v. Corporate Officer of the House of Commons* (1999) 67 Con LR 1. In this case, the Judge took the contractual approach to the award of damages for breach of procurement law.
873 Regulation 47I of the United Kingdom Public Contracts Regulations 2009.
874 *Harmon CFEM Facades v. Corporate Officer of the House of Commons* (1999) 67 Con LR 1.
875 Martin Burgi, 'Damages and EC Procurement Law—German Perspectives', in Duncan Fairgrieve & Francois Lichere (eds), *Public Procurement Law – Damages as an Effective Remedy* (Hart Publishing 2011).

It should be noted that China's current judicial review procedure as to general unlawful administrative behaviour, introduced by the Administrative Procedure Law of China 2015[876] has very limited impact on administrative monopolies.[877] Most administrative monopolies exist in the form of administrative rules and regulations in China, therefore it is proposed that the scope of judicial review in anti-administrative monopoly damages litigation should extend to cover administrative rules, regulations and orders, so as to provide for the following damages assessment procedure.

From a substantive perspective, the AML grounds of the judicial review of the alleged administrative measures include, first the chapter 5 of the AML, according to which the court could assess whether the alleged administrative measure falls within the types of anti-competitive administrative monopoly prohibitions, which has been reflected by the recent court practice; and secondly Article 7 of the AML, whereby to balance the advantages and disadvantages of an exemption from administrative monopoly prohibition. However, as to the latter, proportionality test can be introduced to determine whether a particular anticompetitive regulation of some kind favors the public interest or it is really a product of abusive behaviour and therefore should be struck down. Furthermore, some narrow interpretations are needed as to the definition of the terms in Article 7, such as the sectors affecting "lifeline of national economy", "national security" and "consumer interest".

6. Conclusion

Despite being regarded as the economic constitution of China, the AML has not addressed the major problem which has plagued the enforcement of competition law in the field of administrative monopoly: the lack of effective sanctions, particularly the complete absence of the damages action against the offending administrative monopoly. As discussed above, the previous laws and regulations[878] dealing with administrative monopolies failed to effectively

[876] The Administrative Procedure Law was amended in 2014, and the amended Law has come into force in 2015.
[877] Because, as examined in section 2.2.3.2 above, the scope of the current review procedure is restricted to review of concrete administrative behaviour and a limited number of abstract administrative measures, which only include some normative documents, and exclude administrative rules and regulations.
[878] For example, the 1990 Circular Concerning Breaking Down Inter-Regional Market Blockages and Further Invigorating Commodity Circulation; the Anti-Unfair Competition Law in 1993; the 2001 Regulation on Prohibiting Local Blockages in Market Economic Activities.

curtail monopolies appointed by government agencies in China, partly because of the lack of an effective remedy mechanism. The current competition law, the AML, which came into force in 2008, suffers from a similar inadequacy, because the administrative mechanism introduced by Article 51 AML has proved to be completely ineffective in the investigation and sanction of anti-competitive administrative monopolies. Moreover, the legal base for the damages action provided by Article 50 AML remains silent as to whether it can be applied to administrative monopoly. In addition, the Judicial Interpretation 2012, as the supplementary measure to Article 50, also fails to address the issue of damages action against administrative monopolies.

Therefore, as suggested by some scholars, such as Fox, civil liability for government agencies should be laid down in breach of administrative monopoly prohibitions.[879] Specifically, a further detailed judicial interpretation is needed to expressly recognise the right to damages for administrative monopoly victims, so as to extend the application of Article 50 AML to damages actions taken against administrative monopoly. Through interpretation of the SPC and the legislature, some special substantive and procedural rules could be laid down to counteract the inappropriate engagement and interference by administrative agencies in the market economy.

Meanwhile, the EU's experience in dealing with state-appointed monopolies under Article 106 TFEU is worth referring to by the Chinese legislature on the grounds that, compared with the US aggressive antitrust damages model, the less aggressive EU antitrust damages model which has been initiated the last decade is much closer to Chinese legal tradition. In addition, the US approach to state monopoly within its Constitutional Law[880] is very different from the approach taken by the EU and China, namely the curtailment within the competition framework. Moreover, the leading Member States of the EU, such as France and Germany, enforce the same civil law system as that of China.

From a substantive perspective, the CJEU has developed a great deal of jurisprudence concerning the regulation of State monopolistic measures achieved through undertakings

[879] Eleanor M. Fox, 'An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints', Antitrust Law Journal, Vol.75, No.1 (2008), 173-194.

[880] The Commerce Clause of the US Constitution prohibits the States from adopting and maintaining measures restricting competition among the States, while the private anti-competitive behaviour are subject to the Sherman Antitrust Act. Under the US Commerce Clause, the states may not impose discriminatory burdens on non-local enterprises. Therefore, the US has two legal documents to respectively regulate state anti-competitive measures and private restraints.

appointed by the Member States. When examining State monopoly cases, in order to determine whether the alleged State measure constitutes anti-competitive infringement, the CJEU has clarified the key elements of Article 106(1), such as what are "public undertakings" and "undertakings with special or exclusive rights".

A "public undertaking", as defined by the Commission[881], is generally an undertaking directly or indirectly controlled by public authorities through either ownership; financial participation; or a contractual or structural relationship. In cases concerning public undertakings, the CJEU in *DEI* case, for example, defines an undertaking as controlled by state based on the state's share percentage in the total capital of the undertakings.[882] However, the state major share is not the only indicator of the public undertakings in CJEU cases.[883] In addition, the CJEU also includes public agencies engaging in economic activities within the scope of the meaning of public undertakings.[884]

As to "undertakings with special or exclusive rights", the CJEU has clarified the definition of special and exclusive rights, and the grant of such rights in a series of cases.[885] These undertakings are usually in a dominant position due to the priority, exclusive or special rights conferred on them by the state. While it is generally recognised that the creation of such dominance itself is not the infringement of Article 106(1), however, the case law of the CJEU imposes limits on this general rule, which means that in some situations, the granting of special or exclusive right *itself* might be challenged under Article 106. This approach provides some guidance to the application of Article 7 of the AML in terms of the exemption of undertakings

[881] Commission Directive on the Transparency of Financial Relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L 318/17.
[882] Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission*, [2012] 5 C.M.L.R. 21; Case C-553/12 P, *European Commission v Dimosia EPI Cheirisi Ilektrismou AE (DEI)*, [2014] 5 C.M.L.R. 19.
[883] For example, even the privatized undertakings in which the state still holds a 'golden share' have been considered as public undertakings in the context of Art. 106 TFEU by the CJEU in Case C-212/09 *Commission v. Portugal* [2011] ECR I-10889. In defining public undertaking, the separate legal personality has been considered as not necessary in Case 118/85 *Commission v. Italy* [1987] ECR 2599, where a public administration can be regarded as a public undertaking because it is directly involved in the economic activity.
[884] Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] E.C.R. I-8089.
[885] Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] E.C.R 1-1979; Case C-209/98, *Entreprenorforeningens Affalds (FFAD) v. Kobenhavns Kommune* [2000] E.C.R. I-3743; Case C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale zur Bekampfung Unlauteren Wettwerbs Ev* [1989] ECR 803; case C-179/90, *Merci Convenzionali v. Porto di Genova* [1991] E.C.R I-5889; case C-437/09, *AG2R Prevoyance v. Beaudout* [2011] E.C.R I-973.

with exclusive operation and sale rights.[886]

As to the exemption of certain anticompetitive state monopolies from AML infringement, there has been a lack of clarity in the evaluation as to whether the exemption should be granted to certain anticompetitive administrative measures. Although Article 106(2) TFEU provides different exception grounds[887] from that set out in Article 7 AML, for example the critical sectors affecting lifeline of national economy, the EU approach to the grant of exemption is worth referring to by China. The approach employed by the CJEU in assessing whether the exemption is justified, is *proportionality test*[888] which is based on case-by-case analysis. This could serve as a possible way to determine whether some administrative monopolies are justifiably exempted from the AML, and its application to Article 7 could be that *the administrative monopoly in certain industries is significant and necessary for purpose of lifeline of national economy and national security, and is proportionate to the achievement of consumer interest and technology advances.* This approach is justified to determine whether a particular anticompetitive regulation serves the public interest or whether it is purely a product of administrative abusive behaviour and therefore should be struck down.

As to the question of who should assume the liability of damages payment for the victims of such hybrid of private and public restraint as administrative monopoly, this chapter proposes that civil liability should be imposed not only on the administrative agencies, but also on the SOEs and undertakings conferred with special or exclusive rights, because the administrative monopoly is objectives which are normally realized through the operation of these designated undertakings; both benefit from engaging in the administrative monopoly. Moreover, certain degree of conspiracy and collusion between administrative agency and undertaking in terms of formulating and implementing of anti-competitive administrative measures have posed greater harm to the competing undertakings and consumers. Therefore, as proposed by the author, the joint and several liabilities is the proper method in which the public and private entities assume

[886] Under Article 7 of the AML, in the industries with exclusive production and sales authority, the State shall protect these lawful operations of the businesses, and shall supervise and control these business operations and the prices of these commodities and services provided by these business operators.
[887] For example, the service of general economic interest.
[888] It focuses on the analysis of whether the restraint of competition is necessary and proportionate for the carrying out of certain task, like the service of general economic interest.

their damages liability to victims.

In terms of reforming the procedural aspects of the anti-administrative monopoly damages action, a two-step procedure is proposed to guarantee the right to damages of the administrative monopoly victims, namely a two-step remedy including first the judicial review procedure, and then the follow-on damages assessment. As to approach to review of anticompetitive administrative measure, it is author's proposal of a shift from *per se illegality* approach taken by current administration litigation[889] to effect-based analysis which has been generally used in the assessment of the anticompetitive behaviour in the EU and China.

The EU's experience in public procurement damages procedure, as is referred to as a suitable guide on how to construct a proper procedure for the administrative monopoly damages action. It is proposed that the review procedure and the damages assessment procedure should be integrated together as a two-step action in order to establish access to justice for damages claim, which could be realized through a judicial interpretation to be issued by the SPC.

[889] The Administrative Procedure Law of China 2015.

Chapter 6 Conclusion

1. Summary of the Research

Notwithstanding that an increasing number of antitrust damages actions challenging *private* and *public* anticompetitive behaviour have been brought before the Chinese courts since the coming into force of the AML in 2008, and even though a Judicial Interpretation concerning antitrust damages actions has been in place since 2012, a number of obstacles to the initiation of antitrust litigation, which inhibit the proper award of damages remain unresolved. These obstacles originate not only from the civil procedure system in which private anticompetitive behaviour could be challenged, but also from the lack of an effective litigation mechanism for challenging "public anticompetitive behaviour", i.e., anti-competitive behaviour linked to administrative monopolies.

As identified by the thesis, of most relevance to removing those obstacles in China can be found in the thesis' research questions: what the primary and direct goal of antitrust damages action is; how to properly quantify antitrust damages; the availability of the collective action for antitrust damages; and the approach to damages action against administrative monopoly.

This thesis takes a solution-oriented approach to the research questions by offering possible solutions to enhance antitrust litigation mechanisms for those seeking to challenge private or public anticompetitive behaviour in China, based on a comparative reference to the EU's antitrust damages system. The EU system was chosen because recent decades have witnessed the EU's enthusiasm for harmonising the antitrust damages system among the Member States, starting with the EU Green Paper 2005 and culminating with the 2014 Directive. Additionally, the CJEU, ever since the landmark case of *Crehan* in 2001, has made a great contribution to ensuring access to justice of private individuals in terms of antitrust damages claims arising from anticompetitive behaviour prohibited by Articles 101 and 102 TFEU.

At the national level, the UK has become the leader in facilitating the initiation of antitrust damages actions, since the CAT was specially set up to deal with competition law cases. This

is particularly demonstrated in the antitrust collective action, as an incentivising mechanism for low-value mass harm situations, especially arising as a result of anticompetitive behaviour affecting a large group of consumers.

Meanwhile, regarding State monopoly, the CJEU's Article 106 TFEU case law on State-initiated restraint of competition in the EU has enriched EU jurisprudence and enhanced its enforceability. Furthermore, the damages action as a remedy to enforce public procurement contracts has been proposed and emphasized at the EU level, though the detailed design of the damages mechanism has been left to the Member States. At the national level, for example, Germany, UK, France, have, to different extents, reinforced their public procurement damages system.

Based on the similarities in competition law enforcement between the EU and China, such as the dual-track enforcement of competition law, the complimentary role of private enforcement to public enforcement, and the single legal framework governing state monopoly, the developments in the EU/ European countries, regarding the antitrust damages action and the regulation of state monopoly, could provide comparative reference to enhance the damages action under the AML.

More importantly, the averse attitude of the EU to US-style unmeritorious antitrust litigation culture is fundamentally in line with the aim of the Chinese legislature, which is to establish a well-balanced antitrust damages system: that is, on the one hand, to facilitate private litigation in order to achieve effectiveness of enforcement of the AML, and, on the other hand, to avoid over-deterrence and suppression of productive business activities. Based on this commonality of approach, some of the EU initiatives could be regarded as useful by the Chinese legislature to adopt in order to enhance the AML damages system. While it has to be recognised that the EU's antitrust damages and state monopoly control model does not provide an all-in-one solution for China, nevertheless, there are key elements and ideas found in the EU system that could usefully be interpreted and adopted into the AML system in order to solve several of the problems identified within the current AML system.

The thesis, from the perspective of *full compensation* for the harm arising from *private or public* anticompetitive behaviour, focuses on three aspects, namely the quantification of damages (*Chapter 3*), collective action (*Chapter 4*), and litigation mechanisms against administrative monopoly (*Chapter 5*), which could provide direct and effective contributions to the achievement of full compensation for anticompetitive harm, and thereby enhance the effectiveness of damages mechanisms under the AML.

2. Research Findings and Implications

2.1 Full Compensation rather than Deterrence as the Goal of the Antitrust Damages Action in China

The *research question* which asked what the primary and direct goal of the antitrust damages action in China arises because the current antitrust damages framework only states its ultimate objectives, such as the protection of market competition, public interest and consumers' interest. The clarification of the primary and direct goal of the antitrust damages action in China would provide clear guidance on the interpretation and application of antitrust damages provisions for the courts and parties to antitrust litigation, and would lay a theoretical foundation for the proper choice of antitrust damages measures, in terms of *quantification of antitrust damages*, *antitrust collective actions* and *damages actions against administrative monopolies*.

The debate on compensation/deterrence as goal of antitrust damages litigation has for a long time occupied an important part of the discussion regarding antitrust damages issues among the academics of both the EU and China. In the EU, although the full compensation principle has been officially established as the primary goal of the antitrust damages action by the 2014 Directive, and the debate on the deterrence effect of the damages action continues, by contrast in China, the *compensation* versus *deterrence* debate lacks clarity.

Based on the ultimate objectives of the antitrust damages action established by the Judicial Interpretation 2012, for instance, protection of consumers' interest, the author argues that it

would be more practical to set full compensation as the direct and primary goal of the AML damages action. From the perspective of separate functions of public and private enforcement, private enforcers are better at recovering their losses, while public enforcers are better at punishing and deterring infringements. Therefore, full compensation for the harm is the goal of private enforcement, while the deterrence is the goal pursued by public enforcement.

Specifically, the full compensation principle requires that not only all victims, including direct and indirect purchasers, obtain compensation, but also that all the losses be recovered to restore victims to a situation as if the infringement had not occurred. Therefore, the direct goal of full compensation, actively pursued by the antitrust damages action, could effectively achieve the objective of protection of the public interest, especially consumers' interest.

Meanwhile, it cannot be denied that damages litigation could make some contribution to deterrence, as a complement to the deterrence goal of public enforcement. However, due to the concern of over-deterrence (which is likely to lead to the suppression of pro-competitive economic activities), deterrence is just a beneficial side-effect of the antitrust damages action, since it increases the likelihood of detection and the costs of breach, rather than be an actively pursued goal in its own right. Therefore, the thesis concludes that although deterrence should not be actively pursued by the antitrust damages action, the deterrence effect produced by antitrust damages claims could be properly protected and strengthened in some cases in China.

In the context of the antitrust damages action, compensation and deterrence cannot coexist as mutual goals. Due to the active pursuit of the goal of full compensation, the extent of trade-off in the expected deterrent effect needs to be highlighted, as Chinese legislators consider the policy options and as specific measures are designed to facilitate effective private enforcement under the AML. Since the protection of the public interest is also written into the Judicial Interpretation 2012 as a statutory objective, the rights and interests of any affected entities, in particular, those of the defendant, need to be taken into account, so as to ensure that a balanced litigation mechanism not only facilitates the initiation of meritorious litigation before the courts, but also that it prevents unmeritorious litigation and over-deterrence.

The clarification of the direct goal of antitrust damages action to be full compensation rather than deterrence, could better guide the courts to properly hear antitrust damages actions, and the parties to develop proper litigation strategy.

2.2 The Methods for Proper Quantification of Antitrust Damages

The *research question* as to the assessment of methods for quantification of damages, inherently includes two sub-issues, which are first, the economic methods applied to calculate antitrust damages, and second, the scope of antitrust damages. This question is significant because the quantification of antitrust damages is directly linked to the achievement of full compensation for the harm caused by anticompetitive behaviour in China. However, the AML 2007 and the Judicial Interpretation 2012 fail to provide explicit guidance on how to quantify antitrust damages for the courts and parties to the litigation. More importantly, the clarification of methods of quantification, and the scope, of antitrust damages also contribute to certainty and transparency of the antitrust damages action, in addition to improving litigants' prospects of achieving full compensation.

Since economic analysis has been applied to competition policy, quantification of antitrust damages has become one of the areas where economics permeates into legal practice to the highest level. Some economic methods and techniques, for example, the comparator-based approach, financial-analysis-based and market-structure-based methods, have been proposed by the EU Commission, and have already been applied in practice in the EU. These methods of quantifying damages, can also be employed by Chinese courts and parties to estimate antitrust damages.

From a legal perspective, clarification of the scope of antitrust damages will be the task of the legislature, which is the first step in leading to proper quantification, in order to achieve full compensation. This will require examining the essential elements of antitrust damages proposed by the EU (the actual loss, the loss of profits, and interest on damage) as being the basic elements of damages. Among these three heads, for the interest on damages element, it is important to set the time point from when the interest is calculated and the interest rate. It is

noted that a high interest rate would risk leading to unjust enrichment, making the compensation punitive. This is contrary to the compensatory nature of the antitrust damages. On the other hand, overcompensation might have a deterrent effect on anti-competitive behaviour. Therefore, the determination of interest on damages is an area in which the antitrust damages action could be relied upon to achieve some measure of deterrence, which overlaps with the objective of public enforcement. Although deterrence is not the primary objective of the antitrust damages action in China, it could be a by-product of private enforcement action of the AML, through the adjustment of the interest rate.

In addition to the three elements, the research further finds that these three heads of damages only generate the minimum level of damages, and there might be other elements, for example, damages for future losses or anticipated losses, which could be considered in some cases where, future injuries, material, moral, loss of amenities, a loss of chance, etc. occurred, in order to actually fully compensate for the harm. Furthermore, in an extreme situation, such as where there is no evidence available to estimate the damage caused to the claimant, calculation based on the defendant's illegal profits is also possible as a method of quantifying damages, as long as it would not lead to overcompensation or unjust enrichment.

When calculating antitrust damages, the complementary role played by the antitrust damages action to support public enforcement of the AML should be taken into account. In order to protect the effectiveness of public enforcement, the limited application of joint and several liability to the immunity recipient is a very effective measure to protect the outcome of public enforcement, without prejudice to the effective operation of the antitrust damages action. Under such arrangement, the leniency recipients only assume limited joint and several liability for their own customers. This measure has an impact on follow-on actions rather than stand-alone actions, since the leniency recipients are easier to become the target of the follow-on damages action.

Access to reliable information and data necessary to support economic analysis, is a significant step before starting estimation of damages. In China, a database specialised for antitrust litigation, including comprehensive information, statistics, data of the undertakings and the

market, should be established to support antitrust damages actions. As a supportive measure, access to public sector information should granted for the purpose of quantification of antitrust damages, to ensure the sufficiency and reliability of the data used to estimate the damages.

2.3 Collective Action

In order to achieve full compensation in mass harm claims caused by private anticompetitive behaviour, the collective action mechanism is indispensable, not only because it increases the efficiency of the antitrust damages action, but also because it provides an incentive to low-value-damages victims. *Two research questions* are addressed in order to propose a workable antitrust collective damages action, which are first, whether "opt-out proceedings" (recently proposed by UK to facilitate the antitrust collective damages action) will fit well into the AML damages action and the current collective damages action provided by the Civil Procedure Law in China?; second, how the antitrust collective action mechanism could be designed to facilitate the initiation of antitrust collective damages claims, while avoiding unmeritorious litigation?

The light-touch approach taken by the Judicial Interpretation 2012 to collective action, (that is to simply allow two or more cases to be jointly heard by a competent court under certain conditions), is still far from a sound collective redress mechanism, which would be an effective way for consumers and SMEs to recover their losses in mass harm antitrust situations. The CPL 2012 provides two more types of collective proceeding, which are the opt-in representative action, and the public interest collective action. But each proceeding has its own weaknesses when applied to mass harm claims.

In particular, the public interest collective action is a potentially significant innovation which may enhance consumer collective redress, because it allows the representative action to be brought on behalf of a large and unspecified number of consumers. But any expectation of the newly added consumers public interest collective action in China to fill in the procedural gap, has been undermined by the lack of damages relief, as well as the limitations of the consumer association as the designated representative to bring collective claims. Due to the lack of a specific procedure, there have been no such consumers public interest collective actions

brought by consumer associations in China since the public interest collective action mechanism was put into place in 2012.

Therefore, China has no effective procedural mechanism to be used as vehicle for dealing effectively with small mass claims for competition law breaches. It is noted that the consumers public interest collective action mechanism is a little similar to the opt-out collective proceedings recently adopted specifically for competition law claims in the UK, in that the consumer association could bring collective action on behalf of an unspecified number of consumers. The comparative reference to the UK's limited opt-out collective proceeding could provide a solution to this problem.

There have been several cases brought before the CAT on the basis of opt-out proceedings. Even though some limitations have been imposed on the application of the opt-out proceedings, the CAT still has taken a cautious approach to opt-out proceedings, especially in the recent *Mastercard* case.[890] The CAT conducted a highly fact-specific analysis concerning the opt-out proceedings in this case, dismissing the Collective Proceeding Order (the CPO), because it found no practical way to calculate an estimated loss of each individual claimant from the aggregate damages, from the method proposed by the applicant. For now, it is still hard to see some stimulating effect of the opt-out proceeding on the antitrust damages action in the UK, because of the CAT's strict attitude to the approval of the CPO.

The opt-out proceeding could be a suitable model for the situation where an unspecified number of victims are affected by private anticompetitive behaviour in China. The competent courts should have discretion over whether the litigation could be brought on the basis of opt-out proceedings, or public interest collective proceedings, according to criteria, such as the scale of claimants, commonality, suitability, the public interest test and the goal of compensation.

Meanwhile, it is definitive, from the UK's experience, that in order to avoid unmeritorious damages litigation, some limitations should be imposed on the application of opt-out

[890] *Walter Hugh Merricks CBE v Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe S.P.R.L.*, [2017] CAT 16, 2017 WL 03128998.

proceedings for antitrust damages action in China, for instance, the public interest test, strict requirements on the qualification of representative entities, and practical methods of quantification of individual damages from the aggregate damages.

It is worth noting that both opt-out proceedings in the UK, and the consumers public interest collective action in China are only applied to collective action brought by consumers. As for SMEs, the old opt-in representative action can still be applied to mass harm claims initiated by SMEs. In such a situation, trade associations need to be allowed to bring such collective action on behalf of SMEs, provided these associations satisfy the requirements set out for the representative, for example, that they possess the sufficiency of financial and human resources; legal expertise; and the presence of a direct relationship between the objective of the entity and the interests of represented litigants; and no conflict of interest.

2.4 Damages Remedy against Administrative Monopoly

The *research question* as to the judicial approach to the antitrust damages action instituted against administrative monopoly is significant for achieving the goal of full compensation pursued by the antitrust damages action. Administrative monopolies have in recent decades posed serious problems to market competition in China. However, in the current antitrust damages framework of the AML, the damages remedy against administrative monopoly has not yet been realised, even though the antitrust behaviour of administrative monopolies has been included in the list of infringements prohibited by the AML 2007. Moreover, in the few instances where litigation was instituted against administrative monopolies, the victims have not been properly compensated for their harms caused by administrative monopolies.

Therefore, in addition to the development of the damages action against private anticompetitive behaviour, the establishment of a damages mechanism against the ubiquitous administrative monopoly in China, via administrative procedures, is indispensable to the achievement of full compensation. However, the existing administrative monopoly regulation, including the ambiguous language of Article 7 concerning government control of key sectors, weak public enforcement, and the prevailing of very limited judicial review of administrative monopoly

behaviour, all pose huge obstacles to the mounting of effective private litigation against administrative monopoly.

Based on a comparative examination of the EU's state monopoly control model provided by Article 106 TFEU, the research found that, despite the differences in form and level of State intervention in the economy between China and the EU States, the concepts of the public undertaking and undertakings with special or exclusive rights, the EU approach to granting exemption to SGEIs are particularly worth referring to for initiating improvements to the substantive rules regulating administrative monopolies in China.

China's SOEs, are a typical type of public undertaking, controlled by government normally through ownership, or some contractual, financial, or structural connection between the State and the controlled undertaking. Administrative measures in favour of SOEs in China in effect restrict or distort competition, and thereby can constitute abuse of administrative authority. Despite the complicated links between the government and SOEs in China, antitrust measures could still be designed from the perspective of private enforcement, to regulate the administrative monopoly realized through SOEs and other privileged undertakings. From a private enforcement perspective, the SOEs, together with the relevant administrative agencies, being protected or designated undertakings, contribute to the harm caused to victim undertakings and consumers. Therefore, the SOEs, or the associated privileged undertakings and the relevant offending administrative agencies, should be made jointly and severally liable for the damages caused by their anti-competitive administrative measures or behaviour.

Article 7 of the AML provides a powerful exemption for the administrative monopoly. But the general language has affected its enforceability. The *proportionality test*, which is adopted by Article 106(2) TFEU to grant exemptions to SGEIs from the application of EU competition law, could be introduced into China, to determine whether a particular anticompetitive regulation of some kind favours the public interest, or whether it is really a product of abusive behaviour and therefore should be struck down. Specifically, Article 7 of the AML should be clarified to make it clear that although State-owned industries contribute towards national economic security and are the lifeline of the national economy, nevertheless they still have to

comply with the AML competition rules, *unless* they are able to establish that it is *necessary and proportionate* to the achievement of consumer interests and technological advancement that the AML not apply to their actions; or alternatively, that exception is *necessary* where compliance with the AML's competition rules would undermine the achievement of the stated public interest.

The exemption grounds provided by Article 7, for example, the lifeline of national economy, national security, and technological advances, are not only dynamic concepts which are changing with economic developments and technological improvements, but they also involve consideration of sovereignty functions of the State in economic and security matters. Therefore, the Chinese legislature, the National People's Congress, should further define which industries, affect the lifeline of the national economy, and thereby clarify which industries should be granted proper monopoly status, and in what circumstances.

In addition to these improvements on substantive aspects, a two-step procedure is proposed to the ensure the right to antitrust damages of the victims arising from administrative monopoly. The first step is the judicial review of the anticompetitive administrative measure. The scope of administrative measures subject to judicial review needs to be enlarged, to include not only concrete administrative actions, but also *abstract administrative actions*, such as in forms of order, norms, regulations, legislation, particularly in terms of anticompetitive administrative behaviour, in order to effectively curtail administrative monopoly. Furthermore, as to the reviewing approach to administrative behaviour, a shift from a *per se illegality* approach taken by current administration litigation procedure, to an *effect-based* analysis which has been generally used in the assessment of the anticompetitive behaviour in the EU, should be considered.

A "follow-on" linkage between the judicial review procedure (of the administrative measure) and compensation for anticompetitive harm needs to be established in order to ensure the effectiveness and scope of the antitrust damages award. This is because, for the claimant in an anti-administrative monopoly damages action, obtaining full compensation is the ultimate goal of bringing the lawsuit, thereby satisfying the principle of full compensation pursued by the

AML damages action.

3. Recommendations for Further Research

For one thing, in recent decades a worldwide trend has attracted a great deal of attention that the economics has been permeating into many aspects of competition law, for example, analysis of various kinds of anticompetitive behaviour, assessment of mergers, and quantification of damages. The underlying rational of such interdisciplinary application lies in the valuable complements provided by economists to competition lawyers and judges, in respect of helping them gain a better understanding of the effects of business behaviour, new practical concepts and criteria, and econometric tools which can provide empirical evidence to support arguments. In terms of antitrust damages litigation, since in China experts are allowed to submit professional reports as to specific economic issues, to support arguments made in the legal submissions of one party, economic experts can be appointed to assist the proceedings.[891] As to this procedural issue, further research can be undertaken as to some relevant questions, for example: under what conditions should the courts regard the experts' conclusions as reliable; to what extent can the courts rely on the other side's expert evidence; and whether the court should appoint its own expert. The US antitrust courts have substantial experience in dealing with the economic expert evidence, for example, the standing of expert in the court, the criteria as to the admissibility of expert evidence, and the application of Daubert Test[892] in antitrust cases. These experience is worth referring to by China to improve the application of expert evidence mechanism in antitrust cases.

Another issue that can be considered in future research is the following issue: in addition to consumers, the small-and-medium enterprises(SMEs) are often harmed by anticompetitive behaviour of large companies, for example, by SOEs in China. When harmed by large companies, some SMEs are reluctant to sue the SOEs for compensation for their own

[891] Article 13 of the Judicial Interpretation 2012 permits experts to present their professional views before the courts.
[892] The *Daubert* test originated from the US Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and has been further clarified by the subsequent judgments. It was finally codified into Rule 702 of the Federal Rule of Evidence. The test provides some criteria to prevent the submission of unreliable economic evidence.

considerations, such as the fear of jeopardising existing and potential business relationships, or future cooperation with large companies. In such situations, private enforcement might do more to protect the interest of SMEs, other than the collective action mechanism mentioned in the thesis. This is an area which is worthy of further research.

Another issue worthy of future research includes study of the merit of international cooperation between the EU and China in the area of the antitrust damages action, as the antitrust cases may involve several parties in multiple jurisdictions, where the issues, such as conflicts of law, the jurisdictions, and forum shopping, etc. may arise.

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Appendixes

Anti-Monopoly Law of the People's Republic of China

(The English version is from Westlaw Thomson Reuters)

Promulgating Institution:	Standing Committee of the National People's Congress
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Order of the President of the People's Republic of China No. 68

The Anti-Monopoly Law of the People's Republic of China adopted at the 29th Session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 30 August 2007 is hereby promulgated, and shall take effect as of 1 August 2008.

Hu Jintao President of the People's Republic of China

30 August 2007

Anti-Monopoly Law of the People's Republic of China
(Adopted at the 29th Session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 30 August 2007)

Contents

Chapter 1: General Provisions

Article 1 This Law is formulated to prevent and deter monopoly conducts, ensure fair market competition, increase economic operation efficiency, protect consumer interests and social public interest, and facilitate the dynamic development of the socialist market economy.

Article 2 With respect to monopoly conducts that occur within the territory of the People's Republic of China, this Law shall apply; With respect to monopoly conducts occurring outside the territory of the People's Republic of China which result in any effect to exclude or limit competition in the domestic market, this Law shall apply.

Article 3 For the purposes of this Law, monopoly conducts shall include:

(1) Conclusion of monopoly agreements by business operators;

(2) Abuse of market dominant position by business operators; and

(3) Concentration of business operators that results in or is likely to result in any effect of excluding or limiting competition.

Article 4 The State formulates and implements competition regulation suitable for a socialist market economy and with the aim to improve macro-economic control, and create a unified, open, competitive and organized market system.

Article 5 Business operators may, on the basis of fair competition and voluntariness, expand their operation scale through concentration of business operators in accordance with the law so as to improve their market competitiveness.

Article 6 A business operator in a market dominant position shall not abuse its market dominant position to exclude or limit competition.

Article 7 With respect to the industries that hold controlling position in the State-owned economy, control the lifeline of the national economy, and are related to the national security, and the industries that implement exclusive or monopoly distribution in accordance with the law, the State protects the lawful operation activities of the business operators in the aforesaid industries, moreover, the State supervises and regulates, in accordance with the law, the said operators' operation conducts and the prices of their services and commodities, so as to protect the interests of consumers and promote technological advancement.

Business operators in the industries as specified in the preceding paragraph shall operate their business in accordance with the law, act in good faith, engage in stringent self-discipline, accept supervision from the public, and shall not abuse their market dominant position or their position that allows them to carryout exclusive or monopoly distribution to harm the interests of consumer.

Article 8 Administrative agencies and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power to exclude or limit competition.

Article 9 The State Council shall establish an Anti-Monopoly Committee that shall be responsible for organizing, coordinating, and directing anti-monopoly tasks, and shall perform the following duties:

(1) Research and draft policies relating to competition;

(2) Organize investigation and evaluation of the overall status of the market competition, and issue evaluation report;

(3) Formulate and issue Anti-Monopoly Guidelines;

(4) Coordinate administrative enforcement of anti-monopoly law; and

(5) Other duties specified by the State Council.

The composition and working rules of the Anti-Monopoly Committee of the State Council shall be specified by the State Council.

Article 10 The agencies undertaking the duties of anti-monopoly law enforcement as appointed by the State Council (hereinafter referred to as the "anti-monopoly law enforcement agency of the State Council") shall carry out anti-monopoly law enforcement tasks in accordance with the provisions of this Law.

The anti-monopoly law enforcement agency of the State Council may, based on the actual need, authorize the corresponding authorities of the provinces, autonomous regions, and municipalities directly under the Central Government to carry out anti-monopoly law enforcement tasks in accordance with the provisions of this Law.

Article 11 Trade associations shall strengthen self-discipline of the industry, guide the operators in relevant industries to compete in accordance with the law, and shall maintain market competition order.

Article 12 For the purposes of this Law, a business operator shall mean any natural person, legal person, or other organization that engages in product manufacturing, business operations, or providing services.

For the purposes of this Law, relevant market shall mean the product scope or geographical area within which a business operator participates in competition during a certain period of time with regard to specific product or service (hereinafter referred to as the "product").

Chapter 2: Monopoly Agreements

Article 13 Competing operators are not allowed to conclude the following monopoly agreements:

(1) Fix or change product price;

(2) Limit the production quantity of products or the sales quantity of products;

(3) Divide sales market or raw material procurement market;

(4) Limit the purchase of new technologies and new equipment or limit the development of new technologies and new products;

(5) Collectively boycott transactions; and

(6) Other monopoly agreements as determined by the anti-monopoly law enforcement agency of the State Council.

For the purposes of this Law, monopoly agreements refer to agreements, decisions, or other concerted practices that exclude or limit competition.

Article 14 Business operators and their trading counterparties are prohibited from entering into the following monopoly agreements:

(1) Fix the prices of products to be resold to a third party;

(2) Set the limit for the lowest prices of products to be resold to a third party; and

(3) Other monopoly agreements as determined by the anti-monopoly law enforcement agency of the State Council.

Article 15 If business operators are able to prove that the agreements concluded fall under any of the following circumstances, Articles 13 and 14 of this Law shall not apply:

(1) To improve technologies or research and develop new products;

(2) To enhance product quality, decrease cost, increase efficiency, unify product specification, standard,

or implement division of work based on specialization;

(3) To increase operational efficiency of medium and small operators and enhance their competitiveness;

(4) To save energy, protect environment, assist in disaster relief work, or realize other social public interest;

(5) To relieve severe decrease of sales or apparent overproduction during times of economic depression;

(6) To protect legitimate interests in foreign trade and foreign economic cooperation; and

(7) Other circumstances specified by the law or the State Council.

With regard to circumstances in Items (1) to (5) of the preceding paragraph, if Articles 13 and 14 of this Law are not applicable thereto, business operators shall also prove that the agreements concluded would not severely limit competition in the relevant market may enable consumers to share the interests resulted there from.

Article 16 Trade associations shall not organize operators in the relevant industries to take up any of the monopoly acts prohibited under this chapter.

Chapter 3: Abuse of Market Dominant Position

Article 17 Business operators with market dominant positions are prohibited from engaging in the following acts that abuse their market dominant positions:

(1) Sell products at unfairly high price or purchase products at unfairly low price;

(2) Sell products at below cost prices without justified reason;

(3) Refuse to have transactions with their trading counterparties without justified reason;

(4) Restrict their trading counterparties to only having transactions with themselves or with the business operators that are designated by them without justified reason;

(5) Conduct tie-in sale of products or impose other supplementary unreasonable trading conditions during transactions without justified reason;

(6) Apply differential treatment to trading counterparties with the same conditions in terms of transaction price and other transaction conditions without justified reason; and

(7) Other acts determined as abuse of market dominant position by the anti-monopoly law enforcement agency of the State Council.

For the purposes of this Law, market dominant position shall mean the market position that gives a business operator the power to control product pricing, quantity, and other transaction conditions, or the power to hinder or affect the entry of other business operators into the relevant market.

Article 18 The determination of a business operator in a market dominant position shall be based on the following factors:

(1) Market shares occupied by the business operator in the relevant market and the status of competition in the relevant market;

(2) Ability of the business operator to control the sales market or the raw material procurement market;

(3) Financial power and technological conditions of the business operator;

(4) Dependence of other operators on the business operator in transactions;

(5) Difficulty for other business operators to enter the relevant market; and

(6) Other factors relevant in the determination of the market dominant position of a business operator.

Article 19 A business operator shall be deemed to hold a market dominant position under any of the following circumstances:

(1) The market shares held by a business operator in a relevant market reaches 50% thereof;

(2) The amount of the market shares jointly held by two business operators in a relevant market reaches two-thirds thereof;; or

(3) The amount of the market shares jointly held by three business operators in a relevant market reaches three-quarters thereof;

Under circumstances specified in Items (2) or (3) of the preceding paragraph, if a certain business operator therein holds less than ten percent of the market shares, that business operator shall not be deemed to hold a market dominant position.

With respect to a business operator that is deemed to hold a market dominant position, if there is evidence proving that the business operator does not hold the market dominant position, the said business operator shall not be determined to hold a market dominant position.

Chapter 4: Concentration of Business Operators

Article 20 The concentration of business operators refers to the following circumstances:

(1) Merger of business operators;

(2) A business operator obtains the controlling power over another business operator through acquisition of equity or assets; and

(3) A business operator, through conclusion of contracts and other means, obtains the controlling power over another business operator or is able to exercise decisive influence over another business operator.

Article 21 If the level of the concentration of business operators reaches the threshold for declaration as specified by the State Council, the business operators shall file the declaration thereof with the anti-monopoly law enforcement agency of the State Council in advance; the concentration is not allowed to be carried out in the case of failure to file the declaration.

Article 22 Where the concentration of business operators falls under any of the following circumstances, the concentration may not be subject to declaration to the anti-monopoly law enforcement agency of the State Council:

(1) One of the participating business operators of the concentration holds over 50 percent of the voting shares or assets of each of the other business operators; or

(2) Over 50 percent of the voting shares or assets of each participating business operator of the concentration are held by the same non-participating business operator.

Article 23 When declaring concentration to the anti-monopoly law enforcement agency of the State Council, the business operators involved shall submit the following documents and materials:

(1) Written declaration;

(2) Description of the concentration's influence on the competition status of the relevant market;

(3) Concentration agreement;

(4) Financial and accounting reports of the previous fiscal year of all business operators participating

in the concentration, which have been audited by an accounting firm; and

(5) Other documents and materials specified by the anti-monopoly law enforcement agency of the State Council.

The written declaration shall specify the names, domiciles, business scope of the business operators participating in the concentration, the intended date of the implementation of the concentration, and other items specified by the anti-monopoly law enforcement agency of the State Council.

Article 24 If the documents and materials submitted by the business operators are incomplete, the supplemented documents and materials shall be submitted within the time limit specified by the anti-monopoly law enforcement agency of the State Council. The failure to supplement the documents and materials within the specified time limit shall be deemed a failure of declaration.

Article 25 The anti-monopoly law enforcement agency of the State Council shall, within 30 days from the date of acceptance of the documents and materials submitted by the business operators which conform to the provisions of Article 23 of this Law, conduct the preliminary examination of the declared concentration of business operators, make a decision whether or not to conduct further examination thereof, and shall notify the business operators involved in writing. Before the anti-monopoly law enforcement agency of the State Council makes a decision, the business operators shall not implement the concentration.

If the anti-monopoly enforcement institution of the State Council decides not to conduct further examination or if a decision is not made within the specified time limit, the business operators may implement the concentration.

Article 26 If the anti-monopoly law enforcement agency of the State Council decides to conduct further examination, it shall, within 90 days from the date of the decision, complete the examination and make a decision whether or not to permit the concentration of business operators, and notify the business operators in writing. If the anti-monopoly law enforcement agency of the State Council decides to prohibit the concentration, it shall explain its reasons. During the period of examination, the business operators shall not implement the concentration.

Under any of the following circumstances, the anti-monopoly law enforcement agency of the State Council may extend the examination period specified in the preceding paragraph for no more than 60days after notifying the operators in writing:

(1) The business operators agree to extend the examination period;

(2) The documents and materials submitted by the business operator are incorrect, and further verification is required; or

(3) The relevant conditions have changed significantly after the business operators declare the concentration.

If the anti-monopoly law enforcement agency of the State Council fails to make a decision within the specified time limit, the business operators may implement the concentration.

Article 27 When examining the concentration of business operators, the following factors shall be taken into

consideration:

(1) The market shares held in the relevant market by the business operators participating in the concentration and the controlling power of those business operators over the relevant market;

(2) The level of market concentration in the relevant market;

(3) The influence of the concentration of business operators on market entry and technological advancement;

(4) The influence of the concentration of business operators on consumers and other relevant business operators;

(5) The influence of the concentration of business operators on the national economy development; and

(6) Other factors influencing market competition shall be taken into consideration as determined by the anti-monopoly law enforcement agency of the State Council.

Article 28 If the concentration of business operators results in or may result in the exclusion or limitation of competition, the anti-monopoly law enforcement agency of the State Council shall make a decision to prohibit such concentration of business operators. However, if the business operators involved can prove that the positive influence brought by such concentration on competition is obviously greater than the negative impact brought thereby, or such concentration conforms to the social public interest, the anti-monopoly law enforcement agency of the State Council may make a decision not to prohibit the said concentration of business operators.

Article 29 With regard to concentration of business operators which are not prohibited, the anti-monopoly law enforcement agency of the State Council may decide to attach certain restrictive conditions in order to reduce the negative impact brought by the concentration on competition.

Article 30 Where the anti-monopoly law enforcement agency of the State Council decides to prohibit a concentration of business operators or attaches any additional restrictive conditions to a concentration, it shall publicized such decisions in a timely manner.

Article 31 Where a foreign investor participates in a concentration of business operators by acquisition of a domestic enterprise or other means, if the participation involves the State security, the concentration shall be subject to, in addition to the examination of concentration of business operators according to the provisions of this Law, be subject to the State security examination in accordance with the relevant provisions of the State.

Chapter 5: Abuse of Administrative Power to Exclude or Limit Competition

Article 32 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power to restrict, in any manner or in disguised form, any organization or individual to operating, purchasing, or using products provided by their designated business operators.

Article 33 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power to obstruct the free inter-regional commodity flow by implementing the following acts:

(1) Implement discriminatory charging items, or charting rates, or prices to the non-local products;

(2) Specify technical requirements or examination standards on the non-local products which are different from those for the local products of the same type or require the non-local products to pass redundant examination or certification, so as to restrict non-local products from entering the local market;

(3) Implement administrative licensing specifically for the non-local products, so as to restrict the non-local products from entering the local market;

(4) Establish tolls or adopt other methods to restrict the non-local products from entering or the local products from exiting the region; and

(5) Implement other acts that obstruct the free inter-regional commodity flow.

Article 34 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power to exclude or restrict the non-local operators from participating in local bid invitation or bid submission by implementing discriminatory qualification requirements or examination requirements, or by failing to disclose information pursuant to the law.

Article 35 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power to exclude or restrict non-local operators from making investment or establishing branch offices in the local area by practicing discriminating treatment on non-local operators, or by other means.

Article 36 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power by compelling operators to engage in monopoly conducts that are specified in this Law.

Article 37 Administrative authorities and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power by formulating regulations that contain any content of excluding or limiting competition.

Chapter 6: Investigation of Alleged Monopolization

Article 38 The anti-monopoly law enforcement agency shall investigate alleged monopoly conducts pursuant to the law.

Any organization or individual shall have the right to report any alleged monopoly conducts to the anti-monopoly law enforcement agency. The anti-monopoly law enforcement agency shall keep the confidentiality of the individuals or organizations make such report.

If a report on alleged monopoly acts is submitted in writing accompanied with the relevant facts and evidence, the anti-monopoly law enforcement agency shall conduct the necessary investigation.

Article 39 The anti-monopoly law enforcement agency shall, when investigating alleged monopoly acts, adopt the following measures:

(1) Enter the premise of the business operator under investigation and other relevant locations to conduct the investigation;

(2) Make inquiries about the business operator under investigation, interested parties, or other relevant organizations or individuals, and require them to explain the relevant issues;

(3) Check and reproduce the relevant documents and data of the business operators under investigation, the interested parties or other relevant organizations or individuals, such as relevant documentations, agreements, account books, business correspondence, electronic data, etc.;

(4) Seal and detain relevant evidence; and

(5) Inquire about the operators' bank account.

To adopt measures specified in the preceding paragraph, a written report shall be submitted to the person-in-charge of the anti-monopoly law enforcement agency for approval.

Article 40 When the anti-monopoly law enforcement agency conduct investigation into alleged monopoly conducts, there shall be no less than two law enforcement personnel, presenting their law enforcement certificates.

Law enforcement personnel shall prepare written records of their inquiries and investigation; the signatures of the persons under inquiry or investigation shall be affixed to the records.

Article 41 The anti-monopoly law enforcement institution and its personnel shall bear the obligation to keep the confidentiality the trade secrets they learn during the investigation.

Article 42 The business operators under investigation, the interested parties or other relevant organizations or individuals shall cooperate with the anti-monopoly law enforcement agency in performing their duties pursuant to the law, and shall not refuse or obstruct the investigation carried out by the anti-monopoly law enforcement agency.

Article 43 The business operators under investigation or the interested parties shall have the right to state their opinions. The anti-monopoly law enforcement agency shall verify the facts, reasons, and evidence provided by the business operators under investigation or the interested parties.

Article 44 If the anti-monopoly law enforcement agency, after investigating and verifying the alleged monopoly conducts, determines that those conducts constitute monopoly conducts, it shall make a decision to deal with such conducts pursuant to the law and may publicize the same to the public.

Article 45 With respect to the alleged monopoly conducts under investigation by the anti-monopoly law enforcement agency, the agency shall have the right to suspend the investigation provided that the business operator under investigation promises to take actions to eliminate the consequences of the said conducts within the time limit approved by the anti-monopoly law enforcement agency. The decision to terminate investigation shall clearly state the specific content of the commitment made by the business operator under investigation.

If the anti-monopoly law enforcement agency decides to suspend the investigation, it shall supervise the business operator in fulfilling its commitment. The anti-monopoly law enforcement agency may decide to terminate the investigation provided that the business operator fulfills its commitment.

Under any of the following circumstances, the anti-monopoly law enforcement agency shall resume the

investigation:

(1) The business operator fails to fulfill its commitment;

(2) Major changes occur to the facts that serve as the basis for the decision to suspend the investigation; or

(3) The decision to suspend the investigation is based on incomplete or incorrect information provided by the business operator.

Chapter 7: Legal Liability

Article 46 If a business operator violates the provisions of this Law by concluding and implementing a monopoly agreement, the anti-monopoly law enforcement agency shall order the operator to cease its illegal act, confiscate its illegal gains, and impose a fine of not less than one percent and not more than ten percent of the operator's sales revenue of the previous year. If the business operator has yet to implement the monopoly agreement, it may be imposed a fine of not more than RMB 500,000.

If the business operator voluntarily reports to the anti-monopoly law enforcement agency regarding the monopoly agreement concluded and provides important evidence, it may be imposed a mitigated punishment or exempted from punishment as the case may be.

If a trade association violates this Law by organizing business operators in that industry to conclude monopoly agreements, the anti-monopoly law enforcement agency may impose a fine of not more than RMB 500,000. In serious cases, the administrative authority for the registration of social groups may deregister such trade association in accordance with the law.

Article 47 If a business operator violates the provisions of this Law by abusing its dominant market position, the anti-monopoly law enforcement agency shall order the operator to cease its illegal act, confiscate its illegal gains, and impose a fine of not less than one percent and not more than ten percent of the operator's sales revenue of the previous year.

Article 48 If a business operator violates the provisions of this Law by unlawfully engaging in a concentration of operators, the anti-monopoly law enforcement agency shall order the operator to cease its illegal act, to dispose of its shares or assets within the specified time limit or transfer operation ownership, and to adopt other necessary measures to restore the status prior to the said concentration of operators, and a fine of not more than RMB 500,000 may also be imposed.

Article 49 While deciding the amount of fines to be imposed in accordance with the provisions of Articles46, 47, and 48 of this Law, the anti-monopoly enforcement institution shall consider the nature, severity, and duration of the illegal acts.

Article 50 Business operators causing others to suffer losses as a result of their implementation of monopoly conducts shall be liable for civil liability pursuant to the law.

Article 51 If an administrative authority or organization authorized by the laws and regulations to manage public affairs abuses its administrative power by excluding or limiting competition, the higher level authority shall, in accordance with the law, order it to make a correction and impose penalties on its personnel who

are directly in-charge and other personnel subject to direct liability. The anti-monopoly law enforcement agency may put forward proposals to the relevant higher level authority with respect to handling such matters in accordance with the law.

Where laws and administrative regulations otherwise provide for the handling of acts that exclude or limit competition by administrative authorities and organizations authorized by laws and regulations to manage public affairs by abusing their administrative powers, such provisions shall prevail.

Article 52 Any acts of refusing or obstructing the lawful examination or investigation conducted by the anti-monopoly law enforcement agency, including but not limited to the refusal to provide relevant materials or information, or to provide false materials or information, or to conceal, destroy, or displace evidence, shall be subject to an administrative order from the anti-monopoly law enforcement agency to make a correction, and a fine of not more than RMB 20,000 shall be imposed in the case of an individual, or not more than RMB 200,000 in the case of an organization. In the event of a serious case, a fine of not less than RMB 20,000 and not more than RMB 100,000 may be imposed in the case of an individual, or not less than RMB 200,000 and not more than RMB 1 million in case of an organization. If the act constitutes a crime, criminal liability shall be imposed pursuant to the law.

Article 53 If a party is dissatisfied with the decision that is made by the anti-monopoly law enforcement agency pursuant to Articles 28 and 29 of this Law, it may apply for an administrative reconsideration pursuant to the law. If the party is dissatisfied with the result of the administrative reconsideration, it may file an administrative action in accordance with the law.

If a party is dissatisfied with the decision made by the anti-monopoly law enforcement agency not covered in the preceding paragraph, it may apply for an administrative reconsideration or file an administrative action pursuant to the law.

Article 54 With respect to the anti-monopoly law enforcement agency personnel's acts of abusing his/her power, practicing favoritism, disclosing the trade secrets obtained during the course of the law enforcement, or being derelict in duty, if such acts constitute criminal offense, the personnel concerned shall be held criminally liable. If such acts do not constitute criminal offense, disciplinary action shall be imposed pursuant to the law.

Chapter 8: Supplementary Provisions

Article 55 With respect to business operators' acts of exercising intellectual property rights according to the provisions of laws and administrative regulations, this Law shall not apply; however, with respect to business operators' acts of abusing intellectual property rights to exclude or limit competition, this Law shall apply.

Article 56 This Law shall not be applicable to the joint or concerted practices of agricultural producers and rural economic organizations in their operational activities of production, processing, sales, transportation, storage, etc., of agricultural products.

Article 57 This Law shall take effect as of 1 August 2008.

Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conduct, Adopted by the 1539th meeting of the Judicial Committee of the Supreme People's Court on January 30, 2012 is hereby announced. (Judicial Interpretation 2012)

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Provisions of the Supreme People's Court on Certain Issues relating to Application of Laws for Hearing Civil Disputes Caused by Monopolistic Conducts

In order to hear correctly cases of civil disputes caused by monopolistic conducts, to prevent monopolistic conduct, to protect and promote fair market competition, and to safeguard the interests of consumers and social public interests, these Rules are formulated in accordance with the Anti-monopoly Law of the People's Republic of China, the Tort Liability Law of People's Republic of China, the Contact Law of the People's Republic of China and the Civil Procedure Law of the People's Republic of China, and other relevant laws and regulations.

Article 1 A civil dispute caused by monopolistic conduct (hereinafter referred to as a 'civil monopoly cases') in these Rules, refers to a civil lawsuit filed with the People's Court by a natural person, a legal person or other organization, who suffers losses due to monopolistic conducts or who is in a dispute because the content of a contract, the articles of an industry association, etc., allegedly violates the Anti-Monopoly Law.

Article 2 The People's Court shall accept and hear a civil action that is brought by a plaintiff directly in the People's Court, or an action before the People's Court after a decision on alleged monopolistic conduct by an Anti-Monopoly Law Enforcement Authority becomes legally effective, if the action satisfies other conditions of admissibility specified by law.

Article 3 The Intermediate People's Courts of provincial capital cities, capital cities of autonomous regions, municipalities directly under the Central Government, municipalities with independent planning status, and Intermediate People's Courts designated by the Supreme People's Court shall have jurisdiction in the first instance over civil monopoly cases.
With the approval of the Supreme People's Court, the Primary People's Court's [Grass Roots People's Courts] shall have jurisdiction as courts of first instance over civil monopoly cases.

Article 4 The geographic jurisdiction over civil monopoly cases shall be determined according to the specific circumstances of the cases and in accordance with relevant jurisdictional rules of the Civil Procedure Law and relevant judicial interpretations related cases of tort disputes and contract disputes.

Article 5 If the cause of action in a civil dispute is not a monopoly dispute when the case is filed, and if a defendant asserts a defence or counterclaim based on an allegation that a plaintiff has engaged in monopolistic conduct or that the judgment must be based on the Anti-Monopoly Law, if the court accepting

the case has no jurisdiction over civil monopoly cases, shall transfer such case to the People's Court having jurisdiction thereof.

Article 6 Where two or more than two plaintiffs have respectively filed lawsuits before different People's Courts that both have jurisdiction over the same monopolistic conduct, the People's Court may consolidate the cases into one case for hearing.
Where two or more than two plaintiffs have respectively filed lawsuits before different People's Courts that both have jurisdiction over the same monopolistic conduct, the People's Court that accepts the case at a later time shall, within seven days of learning of the earlier acceptance of the case [by the other People's Court] rule within seven days that the case shall be referred to the People's Court that accepted the case earlier. The People's Court to which a case has been transferred any consolidate the cases for hearing. In its response to the lawsuit, the defendant shall on its own initiative provide to the People's Court that has accepted the case relevant information about other cases in other courts based on the same monopolistic conduct.

Article 7 If an alleged monopoly agreement falls within the circumstance provided in Item 1 to Item 5 of Article 13(1) of the Anti-Monopoly Law, the defendant shall bear the burden of proof on the allegation that the monopoly agreement does not have the effect of excluding or restricting competition.

Article 8 If alleged monopolistic conduct falls within the provisions on abuse of a dominant market position provided in Item 1 to Item 7 of Article 17(1) of the Anti-Monopoly Law, the plaintiff shall bear the burden of proof on the dominant market position in the relevant market of the party alleged to having engaged in monopolistic conduct, and its alleged abuse of dominant market position.
The defendant shall bear the burden of proof on a defence asserting that there is a valid justification for the conduct.

Article 9 If the alleged monopolistic conduct is abuse of dominant market position by a public utility enterprise or other business operator that has been granted monopoly operation qualification according to the law, the People's Court may determine that the defendant possesses a dominant position in the relevant market on the basis of the market structure and competitive conditions, unless there is contrary evidence proving otherwise.

Article 10 The plaintiff may use information publicly disclosed by the defendant as to the evidence of the defendant's dominant market position. If the information disclosed by the defendant to the public proves that the defendant is in a dominant position in the relevant market, the People's Court may make a determination accordingly, unless there is contrary evidence proving otherwise.

Article 11 Where the evidence involves national secrets, commercial secrets, individual privacy or other information that shall be kept confidential in accordance with the law, the People's Court may take protective measures such as conducting a non-public trial, restricting or prohibiting photocopying, limiting disclosure of documents solely to attorneys, ordering parties to sign a confidentiality undertaking, etc., upon the application of the parties or at the court's own discretion.

Article 12 A party may apply to the People's Court to have one or two professionals with the appropriate expertise to appear in court to explain specific issues in the case.

Article 13 A party may apply to the People's Court to entrust independent professional institutions or professionals to conduct market surveys or economic analysis reports on specific issues in the case. With the approval of the People's Court, the parties shall negotiate to agree on the selection of such professional organizations or professionals; if the negotiation fails, the professional organizations or professionals shall be appointed by the People's Court.

The People's Court shall examine and issue its judgments on market research or economic analysis reports described in the preceding provision with reference to the relevant provisions on expert conclusions of the Civil Procedure Law and relevant judicial interpretations.

Article 14 If according to the allegations of the plaintiff and the facts as proven, the defendant has engaged in monopolistic conduct that has caused losses by the plaintiff, the People's Court shall order the defendant to cease the infringing act, to pay compensation of the losses, or to take other civil responsibilities, etc. in accordance with the law.

Upon a request by the plaintiff, the People's Court may include in the compensation for losses the reasonable expenses incurred by the plaintiff in the investigation and prevention of the monopolistic conduct.

Article 15 If the contents of a contract or the articles of an industry association violate the Anti-Monopoly Law or the mandatory provisions of other laws or administrative laws or regulations, the People's Court shall declare it invalid in accordance with the law.

Article 16 The statute of limitation for compensation claim due to monopolistic conducts shall be calculated from the date that the plaintiff knows or should have known of the infringement of its rights and interests by the monopolistic conduct.

If the plaintiff reports the alleged monopolistic conduct to an Anti-Monopoly Enforcement Authority, the statute of limitation shall be suspended from the date of such report. If Anti-Monopoly Enforcement Authority decides not to accept the case, to revoke acceptance of the case, or to terminate the investigation of the case, the statute of limitations shall be re-calculated to begin from the date on which the plaintiff knew or should have known of the agency's decision of non-acceptance, revocation or cessation of the investigation. If the alleged monopolistic conduct has continued for more than two years before the plaintiff filed an action with the People's Court, the amount of compensation for damages shall be calculated to cover the two years before the date when the plaintiff filed the action with the People's Court.