



Is Chinese Private Antitrust Litigation Ready to Take Off?

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China's Anti-Monopoly Law (AML) provides for private right of action. The landscape of antitrust enforcement in China is in stark contrast with that of the United States, where private litigation is a predominant means of antitrust enforcement. Chinese courts accepted 172 antitrust cases in the first five years after the AML became effective.² Among these cases, 71 cases were filed in the fifth year. A great majority of the actions are either dismissed by courts or settled for relatively insignificant amount of money. A majority of these lawsuits involves allegations of abuse of market dominance and vertical constraint, and not price fixing. While Chinese government enforcement agencies have increased enforcement in the last two years, there are no reported private actions following the government investigations. This landscape questions whether Chinese civil litigation procedures provide a framework conducive to the development of private antitrust enforcement.

There is no procedural guidance to private antitrust litigation in the AML. China's current civil litigation rules provide neither powerful discovery tools nor mechanisms for individual consumers to efficiently litigate their claims collectively. With intent to spur private enforcement, the Chinese Supreme People's Court (SPC) issued Rules on the application of the AML in civil litigation in 2012.³ The SPC Rules address important issues including standing, burden of proof, and expert testimony. Since then, private antitrust lawsuits have been on the rise. In a few noteworthy opinions, Chinese courts have demonstrated their confidence in this new area with remarkably sophisticated legal and economic analysis. Nevertheless, significant questions remain concerning whether private litigation will grow into an effective antitrust enforcement mechanism in the near future.

This article explores the prospect of private antitrust enforcement in China from a procedural perspective. It reviews the procedural framework for Chinese private antitrust litigation and noteworthy judicial decisions, with particular focus on: burden of proof, evidence collection, and collective redress. The article suggests that additional procedural rules be considered to facilitate evidence collection and collective redress for the purpose of encouraging private plaintiffs, in particular consumers, to bring successful private enforcement actions.

Burden of Proof and Evidence Collection in Private Antitrust Lawsuits

In China, each party to a civil lawsuit has the burden to prove its own "propositions."⁴ This general rule requires a plaintiff to present evidence in support of her claims and to refute defendant's assertions.⁵ A party bears the adverse consequence of failing to prove its own propositions.⁶ In antitrust cases, a plaintiff generally bears the burden to prove the defendant has engaged in an anticompetitive conduct which causes damages to the plaintiff.

Evidence Collection in Chinese Civil Litigation

Chinese law does not provide a U.S. equivalent discovery mechanism that gives litigants the right to obtain from their opponents information relevant to the dispute, nor does it compel interested parties to comply with investigation requests by lawyers. Chinese lawyers are tasked with gathering evidence in civil litigation for their clients; they have the right to conduct investigation, collect evidence, and review case files kept by courts.⁷ Lawyers can carry out fact investigations by showing their licenses or certificates of their firms to individuals and entities relevant to the dispute.⁸ However, Chinese law does not penalize individuals or companies for failure to respond to a lawyer's investigation inquiry.

Chinese law does not provide for discovery tools such as depositions and requests for document production. Under Chinese law, courts can direct parties to exchange evidence prior to trial, which provides an opportunity for parties to view their opponent's supporting evidence, and clarify their respective claims and defenses. It does not alleviate a party's burden of gathering evidence to prove her own propositions.

Chinese courts have the power to control the evidence investigation process. Courts can order party witnesses to be questioned at trial.⁹ Such witnesses must sign a statement that they will testify truthfully subject to the penalty of perjury; the witnesses will not be permitted to testify if they refuse to sign the statement.¹⁰ When a party witness refuses to appear in court, to answer questions, or to sign a statement, the court will strike the party's corresponding argument.¹¹ Finally, court can also summon for detention a party whose testimony is necessary for the determination of basic disputed facts and who fails to appear in court after being summoned twice by the court.¹² In addition, court can impose fine on or even detain a non-party witness who refuses to cooperate with the court-conducted investigations.¹³

Chinese courts conduct investigations only in limited circumstances. Cooperation with court-conducted investigations is compulsory. Upon a party's request, a court can investigate and collect evidence if a party cannot collect on her own due to "objective reasons."¹⁴ Evidence that a party cannot collect due to objective reasons includes: (1) evidence in the possession of government agencies that is inaccessible to parties; and (2) evidence involving "state secrets, commercial secrets or personal privacy."¹⁵ Courts do not grant discovery requests if the requested evidence is irrelevant or unnecessary to the dispute.¹⁶ Courts can also collect evidence on their own initiative where evidence is "necessary" to the adjudication. Such "necessary" evidence includes evidence related to injury to state interest and public interest, such as in environmental pollution cases and certain consumer cases.¹⁷

Third-party discovery is particularly difficult without court intervention under the Chinese legal system. Individuals and entities possessing information relevant to a case "have a duty" to testify at trial.¹⁸ But Chinese law does not provide penalties for a non-party witness who refuses to respond to a lawyer's request for relevant information or trial testimony.

Moreover, Chinese law requires judges to adjudicate civil lawsuits within relatively short time frames. This is in stark contrast with U.S. antitrust actions, which often take many years to reach trial. In China, a domestic defendant has 15 days to respond to a complaint after being served with process.¹⁹ A defendant's failure to answer does not affect the court's

adjudication process.²⁰ Chinese courts control the litigation process. Courts hold pretrial conferences to ascertain claims and defenses, to review complaint amendments and changes to claims, to address evidence collection and evidentiary issues, to direct parties to exchange evidence, and to mediate.²¹ Chinese law requires courts to close a case within six months after a case is accepted.²² For cases subject to simplified proceedings,²³ courts are required to conclude in three months.²⁴ In practice, these time limitations discourage courts from assigning a lengthy time period for evidence collection.

Significant challenges in evidence collection exist in China where parties have limited means to gather evidence and where compulsory court-conducted investigation is not a routine practice. This is particular the case for private antitrust plaintiffs who carry the burden of proving their claims. In antitrust cases, plaintiffs need to obtain extensive and specific facts related to market and competition conditions from opponents and third parties. Where the law provides no compulsory means to obtain information from opponents and third parties, carrying the burden of proof is difficult.

The Burden Shifting Provision in the SPC Rules

The SPC Rules on the application of AML in 2012 intend to ease the burden on private plaintiffs in adducing obtaining sufficient evidence to sustain their claims. Where plaintiffs allege a “hard core” violation of the AML, including price fixing, horizontal agreements restricting development of new technology and group boycotts,²⁵ the burden of proof is shifted to the defendant to show that defendant’s conduct at issue does not have the effect of eliminating or restricting competition in the relevant market.²⁶ In addition, the SPC Rules permit plaintiffs to rely on defendants’ own public statements to prove market dominance, unless defendants can submit sufficient evidence to the contrary.²⁷

While this burden-shifting rule to some extent eases private plaintiffs’ burden of proof, significant challenges in evidence collection remain. For instance, private plaintiffs alleging price-fixing claims are still required to present adequate evidence and economic analysis to prove damages and to refute defendants’ assertions that exemptions apply.²⁸ In cases involving abuse of market dominance claims, plaintiffs carry the burden to prove the scope of a relevant market, market dominance, abuse of market dominance by the defendant, and damages. Detailed and comprehensive market information is also needed by plaintiffs’ experts to conduct adequate economic analysis. Much of the required information is usually in the hands of defendants and is often confidential or commercially sensitive. While the SPC Rules permit plaintiffs to use defendants’ own public statements to prove market dominance, such public statements often fail to address the specific relevant market and are excluded on relevance ground. Without discovery tools similar to those available in U.S. civil litigation which allow parties to effectively obtain the information from opponents and third parties, satisfying the burden of proof is challenging and costly, in particular for individual consumers.

Private plaintiffs are not the only ones who face the challenges in proving their cases. In an abuse of market dominance case, for instance, a defendant is required to show its conduct

has no anticompetitive effect and/or that its conduct falls into one of the exemptions under the AML.²⁹ Detailed and specific market information necessary for the defense often is in the possession of third parties. Without a compulsory third-party discovery mechanism, it will be difficult for defendants and their experts to put up successful defenses.

Exemplar Decisions on Burden of Proof

Two recent exemplar court decisions pointed to these procedural issues private antitrust litigants are facing.

- *Qihoo v. Tencent*³⁰

In October 2014, the SPC issued its first antitrust opinion in *Qihoo v. Tencent*. Qihoo and Tencent are major internet companies in China. Qihoo alleged Tencent abused market dominance by forcing users to choose between Tencent's instant messaging software bundle (which includes internet safety functions) and Qihoo's internet safety software. In a lengthy opinion, the SPC affirmed the lower court's decision and dismissed the case. The SPC held plaintiffs alleging abuse of market dominance have the burden to define the relevant market and to prove market dominance, while defendants have the burden to prove their conduct is proper under the AML. The SPC rejected several assertions by Qihoo concerning certain components of the relevant market on the ground of lack of evidence.

The SPC's decision highlights the importance of obtaining detailed market information and comprehensive analysis. Tencent has more than 80% market share. Pursuant to Article 19 of the AML, Tencent presumptively has market dominance and the burden would be shifted to Tencent to prove it does not have market dominance. The SPC did not apply the burden-shifting rule. The SPC held market share is only a "rough and possibly misleading" indicator of market dominance. The SPC then analyzed various market factors, including: ease of new market entry, market competition conditions, Tencent's ability to control price and other trading conditions, Tencent's financial and technological resources, and the degree of reliance of other market players on Tencent. The SPC concluded there is insufficient evidence to determine Tencent has market dominance.

This case demonstrates the importance of sophisticated market analysis based on detailed and specific market information. Both parties submitted thousands of pages of evidence to the court, many of which are commercial industry reports. Reflecting on the unsuccessful litigation, plaintiff's counsel noted the difficulty in collecting relevant market information for its expert analysis and for sustaining its claims.³¹ Plaintiff's counsel regretted not requesting the court to conduct third-party investigations, which could lead to additional useful information in support of its claims.³²

- *Ruibang v. Johnson & Johnson*³³

In a case reported as the first court victory for private antitrust plaintiffs, Shanghai High People's Court similarly applied the general civil litigation rule on burden of proof and entered a judgment in favor of plaintiff. *Ruibang v. Johnson & Johnson* is a case filed by a medical suture wholesaler against the manufacturer Johnson & Johnson, alleging illegal

resale price maintenance in violation of the AML. The first-instance court dismissed the case for failure to prove antitrust violation. Shanghai High People's Court reversed on appeal.

One of the key issues on appeal was the burden of proof. Plaintiff Ruibang asserted that it should not be required to prove that a resale price maintenance restriction has anticompetitive effects because article 14 of the AML expressly prohibits such restrictions without mentioning the requirement of proving anticompetitive effects. Ruibang asserted the burden-shifting provision in the SPC Rules should apply and defendant should have the burden to prove its conduct is proper under the AML.

Shanghai High People's Court upheld the lower court's ruling that the burden-shifting provision does not apply to resale price maintenance cases. Article 13 of the AML, which addresses horizontal agreements, contains the definition of anticompetitive agreement. The court held the definition of anticompetitive agreement in Article 13 does not only apply to that article; it applies to the entire statute, including article 14 which prohibits resale price maintenance. Therefore, plaintiffs must establish resale price maintenance is an "anticompetitive agreement" prohibited by the AML. Pursuant to the general civil litigation rule governing burden of proof, the plaintiff is required to prove that the defendant has imposed resale maintenance restriction, that the restriction has anticompetitive effects, and that the plaintiff suffered damages as a result. Defendants must submit evidence that there are no anticompetitive effects.

The *Ruibang* decision again highlights the importance of obtaining comprehensive market information and detailed economic analysis. In determining whether the resale price maintenance restriction is anticompetitive, the court considered several factors: whether the defendant has a "strong" market position; whether there is sufficient competition in the relevant market; the defendant's motive in imposing the restriction; and the effect of the restriction on competition. Unlike the lower court, the Shanghai High People's Court based its determination of market power on multiple considerations. While defendant had only about 20% of relevant market share, it was able to maintain the same price level for 15 years and had strong brand influence and control on distributors. Consequently the court held the defendant had a "strong" position in the market. Significantly, at the conclusion of its opinion, the court noted that defendant Johnson & Johnson failed to defend itself because it failed to provide evidence on the concentration of relevant market, its market share, and the effect of its resale maintenance restriction on market competition.

Qihoo and *Ruibang* are landmark decisions illustrating the need for plaintiffs and defendants to obtain evidence adequate to satisfy their burden of proof. Significantly, market share is only one of the factors for determining market dominance and market power in these cases. Plaintiffs and defendants need to collect comprehensive information about the market and competition circumstances in order to sustain their respective claims and defenses.

Evidentiary Value of Government Investigation Decisions

In the United States, guilty pleas in government investigations constitute preclusive effect against defendants in follow-on private damages actions against defendants.³⁴ Permitting the findings of government authorities to be presented as evidence in subsequent court proceedings significantly alleviate the burden of plaintiffs as they need to show only the fact of harm and the amount of damages.

In China, there are no reported follow-on lawsuits based on government enforcement orders to date. Neither Chinese law nor the SPC has specified whether guilty pleas in government investigations are to be accepted by courts as conclusive evidence of liability. An early draft of SPC Rules stated that factual determinations contained in a government enforcement decision need not be proved by plaintiffs in subsequent court proceedings, except where a defendant was able to submit new evidence sufficient to rebut the factual determination. This provision is not included in the final SPC Rules.³⁵ Judicial guidance on the evidentiary value of government enforcement decisions would benefit private plaintiffs significantly in China where there are no powerful procedural tools for parties to obtain evidence.

Collective Redress Mechanism

In the United States, class actions are the primary mechanism for private enforcement of antitrust law. They allow plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs. An aggressive and capable antitrust plaintiffs' bar has developed in the United States to pursue class actions following government prosecutions and in situations where individual plaintiffs might not have the ability or incentive to sue.

China does not have class action mechanisms. The SPC Rules only provide that multiple antitrust actions regarding the same alleged anticompetitive conduct can be consolidated for adjudication.³⁶ The SPC Rules do not provide guidance on how consolidated actions proceed.

It is not clear whether "joint litigation" will be available to antitrust plaintiffs. The joint litigation proceedings have been permitted only in a few types of actions such as environmental pollution, securities fraud and certain other claims involving public interest. An organization designated by law can bring litigation on behalf of public in environmental and consumer protection cases.³⁷ In "joint litigations," multiple actions seeking common relief are consolidated upon consent of all parties and court approval.³⁸ Where joint litigants have common rights and obligations to the subject matter of the joint litigation, one litigant's litigation conduct applies to other joint litigants upon their consent. Joint litigants can elect a representative litigant who can litigate on behalf of the group.³⁹ The representative's litigation conduct applies to the group of litigants it represents.⁴⁰ However, a representative's modification of its litigation propositions, acceptance of the opponent's propositions and settlement must be consented to by the group it represents.⁴¹

In contrast to the class actions in the United States, joint litigation in China requires that each litigant participate in the litigation. A court judgment in a joint litigation only applies to litigants who have registered with courts.⁴² This means plaintiffs' lawyers need to devote significant time and effort to communicate with individual clients and to litigate the claims for clients on individual basis. Significantly, lawyers are prohibited from making contingency fee arrangements in joint actions, and therefore have no incentive to take such cases.⁴³

An effective collective redress mechanism is important for private antitrust enforcement. The costs and burdens of conducting fact intensive discovery, retaining expert witnesses and proving elements of antitrust claims are often substantial. In contrast, consumers' individual stakes are often very small and ultimate recovery is minimal. As a result, individual claimants practically have no means or incentive to pursue litigation.⁴⁴ On the other hand, big corporate defendants hold superior power and financial resources to prevail through a battle of attrition. The lack of provision for an effective collective redress mechanism in practice denies individual claimants the ability to pursue damages from more powerful defendants.

China's current legal system does not provide an effective mechanism for individual claimants to pursue relief on a collective basis and to share expenses, nor does it provide sufficient incentive for lawyers to litigate the claims on behalf of consumers. For individuals whose losses are small, the lack of an effective collective redress mechanism makes private litigation costly, inefficient and unattractive. The threat of massive collective antitrust claims thriving in China may not be imminent.

Is the Wave of Private Antitrust Lawsuits Coming to China?

The current landscape of private antitrust litigation in China demonstrates significant procedural challenges for private litigants. In particular, in abuse of market dominance cases, where information for proving market dominance is often in the hands of defendants and is often of highly confidential nature. In vertical restraint cases, plaintiffs are faced with challenges of proving anticompetitive effects. Defendants in vertical restraint cases are also faced with challenges of proving their defenses with extensive and specific market information. In China, where there are no civil procedure rules providing right to opponent's relevant files, and court-conducted investigation is not a routine part of litigation, satisfying burdens of proof is difficult in antitrust cases. Guilty pleas in government investigation can ease the burden of proof for plaintiffs if they are accorded significant evidentiary value on liability, as in other jurisdictions.

Individual claimants lack sufficient power, resources, and incentives to vindicate their rights under the AML in the current legal system. An effective collective redress mechanism to provide them with efficient means to seek relief collectively will spur the development of private enforcement. Before these procedural challenges are adequately addressed, private antitrust litigation in China will likely remain a costly and challenging tactic for companies who have resources, and beyond the reach of individual consumers.

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² This was announced by a SPC judge in an antitrust conference in Beijing in 2014. Historically, Chinese court judgments and rulings were not routinely published, with the result that only a limited number have been publicly accessible. Since January 1, 2014, all People's Courts are required to publish their judicial opinions at a designated website except in certain circumstances.

³ The SPC Rules on Several Issues Regarding the Application of Law to Civil Disputes Involving Anticompetitive Conduct in 2012, effective June 1, 2012 (SPC Rules).

⁴ The Law of Civil Procedure of the People's Republic of China, effective August 31, 2012, art. 64.

⁵ The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, effective February 4, 2015, art. 90.

⁶ *Id.*

⁷ The Law of Civil Procedure of the People's Republic of China, art. 61. See also The SPC Rules Regarding Litigation Agents' Review of Civil Case Materials, effective December 7, 2002.

⁸ The Law of the People's Republic of China on Lawyers, effective January 1, 2013, art. 35.

⁹ The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, art. 110.

¹⁰ *Id.*, art.119.

¹¹ *Id.*

¹² The Law of Civil Procedure of the People's Republic of China, art. 109. The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, art. 174.

¹³ The Law of Civil Procedure of the People's Republic of China, art. 114.

¹⁴ *Id.*, art. 64.

¹⁵ The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, art. 94.

¹⁶ *Id.*, art. 95.

¹⁷ *Id.*, art. 96.

¹⁸ The Law of Civil Procedure of the People's Republic of China, art. 72.

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- ¹⁹ *Id.*, art. 125. Foreign defendants have 30 days to respond to complaints. An answer to complaint must include the defendant's name, address and contact information.
- ²⁰ *Id.*
- ²¹ The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, art. 225.
- ²² The Law of Civil Procedure of the People's Republic of China, art. 149. The chief justice of a court can approve an extension of six months. Additional extension must be reported to and approved by a court of superior level. *Id.*
- ²³ Chinese courts apply simplified proceedings to adjudicate cases not involving complex disputes. *Id.*, Chapter 13. Cases subject to simplified proceedings are heard by one judge, and not a collegial panel. *Id.*, art. 160.
- ²⁴ *Id.*, art. 161. The chief justice of a court can approve an extension of no more than six months. The SPC's Judicial Interpretation of Applying the Law of Civil Procedure of the People's Republic of China, art. 258.
- ²⁵ See the AML, art. 13 for a list of "hard core" antitrust violations.
- ²⁶ The SPC Rules, art. 8.
- ²⁷ The SPC Rules, art. 10.
- ²⁸ See the AML, art. 15 for a list of exemptions for antitrust violations.
- ²⁹ See *infra* discussion of *Ruibang v. Johnson & Johnson*.
- ³⁰ *Beijing Qihoo Technology Co. Ltd. v. Tencent Technology (Shenzhen) Co. Ltd. & Shenzhen Tencent Computer System Co., Ltd.*, Civil Judgment of Supreme People's Court of China, 2013 Min San Zhong No. 4, entered October 8, 2014.
- ³¹ *Why Did 360 Lose: Lawyer Zhao Ye's 3Q Antitrust Case Notes*, Zhao Ye, Forbes China, available at <<http://www.forbeschina.com/review/201410/0038162.shtml>>, October 17, 2014.
- ³² *Id.*
- ³³ *Beijing Ruibang Yonghe Science & Commerce Co. Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co. Ltd.*, Civil Judgment of Shanghai High People's Court, 2012 Hu Gao Min San Zhong No. 63, entered August 1, 2013.
- ³⁴ 15 U.S.C. 16 (a).
- ³⁵ A Supreme Court Justice stated in an antitrust conference that courts can "reference" and "respect" factual determinations in a prior government investigation decision. As the final fact finder, courts have the right to review and to determine if a prior government investigation decision is appropriate. *Heated Discussion on the Professionalism of Adjudication of Chinese Antitrust Civil Lawsuits*, Jiang Anjie, China Daily, June 25, 2014, available at <<http://epaper.legaldaily.com.cn/fzrb/content/20140625/Articel12001GN.htm>> (in Chinese).
- ³⁶ *The SPC Rules*, art. 6.
- ³⁷ The Law of Civil Procedure of the People's Republic of China, art. 55.
- ³⁸ *Id.*, art. 52.

³⁹ *Id.*, art. 53.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*, art. 54.

⁴³ Regulation of Legal Services Fee by China National Development and Reform Commission and Ministry of Justice, effective Dec. 1, 2006, art. 12.

⁴⁴ See, e.g., *Jerry Enters. of Gloucester County, Inc. v. Allied Beverage Group, LLC*, 178 F.R.D. 437, 445 (D.N.J. 1998) (“It must be understood that a class action plaintiff may not have very much incentive to contact an attorney or to investigate a potential claim where the claim may be tiny. . . . The whole mechanism of the class action recognizes this lack of incentive and the collective action problems inherent in many individuals having potentially small claims, and encourages lawyers to prosecute these actions on behalf of plaintiffs by holding out the promise of large fee awards.”)