I. Introduction

1. Recent years have witnessed a rapid increase in private antitrust litigations in China. By the end of May 2014, Chinese courts had already accepted 188 cases, and concluded 172 cases, while the Chinese courts accepted 71 cases, concluded 69 cases in 2013 and accepted 30 cases in 2012. In addition, the private litigation cases have become more diversified and have included more complicated issues such as two-sided market, standard essential patent, resale price maintenance, refusal to deal and essential facilities. Chinese courts, including the Supreme People’s Court (“SPC”), have issued lengthy opinions with remarkably sophisticated legal and economic analysis, demonstrating a level of confidence and openness unseen in Chinese judicial system.

2. Despite the progress made in the last few years, significant questions remain concerning the role of private antitrust litigation in Chinese antitrust enforcement. For example, how do Chinese courts allocate the burden of proof and collect evidence? Could private antitrust litigation help encourage competition and enhance social welfare? What are the impacts of private antitrust litigation on public enforcement?

3. This article reviews the recent development in private antitrust enforcement in China. We focus on three topics of interest. First, we explain the general principles for the burden of providing evidence in an antitrust civil litigation. Second, we discuss how to bring an expert witness in an antitrust civil litigation and what role an outside expert could play. Finally, we explore how private antitrust litigation affects agency enforcement decisions and vice versa.

4. The rest of the paper is organized as follows: Section II provides an overview of the legal principle for the burden of proof in private antitrust litigation; Section III examines the effect of expert witness in Chinese court; Section IV discusses the relationship between private litigation and public antitrust enforcement; Section V concludes.
II. The burden of proof and its challenges

5. Article 50 of the China’s Anti-monopoly Law (“AML”) stipulates that market players causing damage to others through their anticompetitive practices shall bear civil liability.\(^1\) To implement Article 50 of the AML, SPC issued the Provisions on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (“Judicial Interpretation”) in January 2012.\(^2\) In addition, private antitrust lawsuits are considered civil lawsuits. Therefore Civil Litigation Law of PRC and relevant judicial interpretation also guide the procedure of private antitrust litigation.\(^3\)

6. The AML stipulates four types of anticompetitive practices: monopoly agreements, abuse of dominance, administrative monopoly, and anticompetitive mergers. In practice, private litigations have been filed in a Chinese court against both monopoly agreements and abuses of dominance. Therefore, we review the burden of proof for both monopoly agreements and abuses of dominance in a Chinese court.

7. A general principle of the Civil Litigation Law in China is that a party bears the burden of providing evidence in support of any allegations it makes. As such, two provisions in the Judicial Interpretation explicitly regulate the allocation of the burden of proof (Articles 7 and 8) for monopoly agreements and abuses of dominance.

1. Monopoly agreements

8. According to AML, monopoly agreement is defined as “an agreement, decision or other concerted practice which eliminates or restricts competition.” The monopoly agreements include both horizontal and vertical monopoly agreements. Horizontal agreements, such as price fixing, limiting output, or market partitioning, are explicitly

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2 Provisions by the Supreme People’s Court on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, [2012] Judicial Interpretation No. 5.
3 Civil Litigation Law of the People’s Republic of China, as last amended by [2012] Presidential Order No. 59.
outlawed. For vertical agreements, AML only explicitly lists resale price maintenance (“RPM”).

9. Article 7 of the Judicial Interpretation stipulates that, where the alleged monopolistic conduct involves a horizontal monopoly agreement as described in Article 13.1(1)-(5) of the AML, the plaintiff bears the burden to prove the existence of monopoly agreements, the losses suffered, and the causality, while the defendant assumes the burden to prove that the agreement does not have the effect of excluding or restricting competition. It is worth mentioning that, unlike other jurisdictions, horizontal monopoly agreements are not treated as per se illegal in China and defendant could provide evidence to show that the agreements meet the condition in one or more of the exemption situations listed in Article 15 of the AML. For example, in the *Shenzhen pest control* case, the defendant successfully argued based on the public interest clause in Article 15 of AML.⁴

10. With respect to the vertical monopoly agreements, the Judicial Interpretation does not explicitly explain the burden to prove for the anticompetitive effect.⁵ The normal rules for burden of proof provided in Civil Litigation Law are applicable. The plaintiff needs to prove that a vertical agreement has the effect of excluding competition. In the *Johnson & Johnson* case, a distributor of Johnson & Johnson alleged that the medical equipment maker had introduced unlawful RPM in their contract. On 18 May 2012, the court of first instance (Shanghai No. 1 Intermediate Court) dismissed the action because the plaintiff failed to provide enough evidence to show that RPM has anticompetitive effect.⁶ Later on, on 1 August 2013, the second-instance court (Shanghai Higher People’s Court) overruled the judgment of the court of first instance and ruled in favor of the plaintiff.⁷ In its decision, the Shanghai Higher People’s Court made it clear that in a PRM dispute, the plaintiff bears the burden to prove the existence of the RPM agreement, as well as its anticompetitive effects.

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⁵ The Judicial Interpretation explicitly allocates the burden to prove for anticompetitive effect upon the defendant for horizontal agreements.


2. Abuse of dominance

11. Article 8 of the Judicial Interpretation states that, where the alleged monopolistic conduct is found to be the abuse of dominant market positions regulated in the paragraph 1 of Article 17, the plaintiff shall undertake the burden of proof of the dominant market positions and the alleged abuse of dominant market positions. The defendant shall take the burden of proof when it pleading for the reasonability of the conduct.

12. In practice, plaintiffs typically need to first define and prove the relevant market, then show the existence of dominant market position, and the existence of the abusive conducts. Based on the published cases, market definition and proof of dominance are usually the key facts that plaintiff needs to establish.

13. In the Tencent case, Qihoo 360, an Internet safety software company, alleged that Tencent abused market dominance by forcing users to choose between its instant message software and Qihoo 360’s antivirus software. The SPC affirmed the lower court’s decision and dismissed the case because the plaintiff failed to provide sufficient evidence to determine that Tencent has a dominant market position.8 SPC agreed with a narrower market definition and found Tencent had more than 80% market share. However, the court cited other factors such as the ability to control price, the ease of entry and the degree of reliance of other companies on Tencent and concluded that Tencent does not have dominant position.

14. To alleviate the burden of proof, the Judicial Interpretation allows some presumptions that shift the burden to the defendants. These include cases involving public utilities and legal monopolies. Article 9 of Judicial Interpretation states that, where the alleged monopolistic conduct is an abuse of dominant market position by a public utility or any other undertaking that has a dominant position pursuant to law, the people’s court may, in light of the market structure and the specific circumstances of competition, determine that the defendant has a dominant position in the relevant market, unless such a determination

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can be overturned by contrary evidence. For example, the plaintiff in the InterDigital case successfully established dominance because the defendant’s possession of standard-essential patent. Similarly, in the Shaanxi Digital TV case, the defendant lost the case because it was a legal monopoly in the cable service market.

15. In addition, plaintiff could use defendant’s public statement to prove market dominance. According to Article 10 of the Judicial Interpretation, a plaintiff of a case may use the defendant’s publicly disclosed information as evidence to prove the latter’s market dominant position. The relevant court may determine that the defendant is dominant in the relevant market if the information disclosed so proves, unless there is sufficient evidence to the contrary.

3. Challenges

16. Although not all private antitrust litigation decisions are available to public, based on the available judgements, it seems that it is fairly difficult for plaintiff to win in an antitrust litigation. The lower success rate by the plaintiff may be a result of a number of factors.

17. First, it is often difficult for plaintiff to collect evidence. For example, in abuse of dominance case, the plaintiffs often do not have access to confidential market information to define market, prove dominance and calculate damages. Courts have rejected plaintiff case because plaintiff had not defined a proper relevant market or had not provided enough evidence to support its argument.

18. Second, judges are required to adjudicate civil lawsuits within a very short time period in China. As such, neither the plaintiffs nor the defendants have enough time to collect evidence. Chinese courts typically close a case within six months after it is accepted. This time limitation puts tremendous pressure on plaintiffs to collect evidence in a litigation case.

19. Third, private antitrust litigation is still at an earlier stage. In many cases, the parties have not retained experienced law firms and economists to advise them. This lack of
experience in antitrust litigation affects the quality of evidence provided to the court and may have contributed to the lower success rate of the plaintiff side.

**III. Effect of expert witness in antitrust civil litigation**

20. A party in antitrust civil litigation may rely on the testimony of expert witness to present its evidence. Expert witness could play an important role to define the relevant market, analyze dominant market position, and evaluate the effects on competition. For some of the high-profile cases, both plaintiff and defendant have appointed economists as experts for monopoly agreement case and abuse of dominance case.

21. Market definition is often a very critical step in an antitrust litigation. According to AML, the market definition includes both relevant product market and geographic market. The Guidelines on the Definition of the Relevant Market provides guidance on how to define market in practice, including the use of economic tools in such exercise. In some of the high-profile cases, the court had relied on lengthy economic analysis provided by the outside economists. For example, in the *Tencent* case, the court relied extensively on written reports and testimony from economists engaged by each party, statistical analysis and industry report by independent third parties and documentation of functionality of the online services.

22. Analysis of market dominance is another area where the court could rely on expert witness. The AML stipulates that a number of factors should be used to assess the dominant position of a firm, including market share, the ability to control the sales or purchase, financial and technical capacity, the extent of economic dependence by other companies and entry barriers. In the *Tencent* case, the defendant provided economic evidence that shows Chinese consumers frequently switch instant messenger service. The SPC cited these as evidence that Tencent does not have the ability to control price. In addition, the court found consumers do not rely on Tencent based on the evidence provided by the defendant that 90% of Chinese instant messenger customer used multiple platforms.

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23. Damage calculation could rely on outside expert as well. For example, in the Johnson & Johnson case, Shanghai Higher Court analyzed the claim for damages in detail. In its decision, the damages were calculated based on the normal profits in the relevant market after taking into account of a number of factors, such as differences of prices between the relevant product manufactured by the appellee and other manufacturers, purchase prices, discounts and taxes of distributors, and the profit assignment between appellee and distributors.

24. Introducing expert witness is still a relatively new development in antitrust litigation in China. Only in a few high-profile cases, such as the Tencent case and Johnson & Johnson case, both parties were advised by experienced lawyers and economist with antitrust specific knowledge. In many other cases, the parties did not use all the available resources and this may affect the quality of evidence provided in a court and explain the low success rate by the plaintiff side.

IV. Relation between anti-monopoly civil procedures and administrative enforcement

25. Chinese antitrust agencies have stepped up enforcement actions against alleged antimonopoly behaviors in recent years. For example, the National Development and Reform Commission (“NDRC”) had leveled heavy fines against companies for violating AML, including charges of abuse of dominance (Qualcomm) and monopoly agreements (Audi, Mercedes, Maotai and Wuliangye). State Administration of Industry and Commerce (“SAIC”) had launched investigation against Tetra Pak and Microsoft, although the decision is still pending.

26. In some instances, the public enforcement agency seems to closely follow the court decisions. For example, NDRC used the same methodology in the InterDigital case to determine that Qualcomm had a dominant market position because its possession of large number of standard-essential patents. While, in other instances, it seems that the public enforcement agency may not have an aligned approach with the courts when it comes to the level of burden of proof. For example, the judgement by the Shanghai Higher
People’s Court clearly stated that plaintiff in an RPM case needs to prove not only the existence of the RPM agreements but their anticompetitive effects. The published decisions by NDRC on vertical agreements cases have not presented sufficient evidence of anticompetitive effects.

27. In addition, it seems that the administrative enforcement agencies have issued much larger fines than the damage award in a private antitrust litigation. The public enforcement agencies typically calculate fines based on some percentage (between 1% and 10%) of past year sales revenue without explaining how the agency calculated the penalties.

28. Although there are no reported private actions following the government investigation yet, these differences between public enforcement decision and private litigation raise very interesting questions. What are the impacts of agency decision on private antitrust litigation? Would the precedents in private litigation have an impact on future agency enforcement?

29. According to Article 2 of the Judicial Interpretation, Chinese court could accept a civil lawsuit directly filed by a plaintiff, or filed by a plaintiff after the decision by the anti-monopoly law enforcement agency. If plaintiff filed the case after the public enforcement decision, this may change the dynamics of both public enforcement and private litigation.

30. First, it could change the burden of proof in private antitrust litigation. The plaintiff could be released from burden of proof in civil proceeding for facts affirmed by antitrust enforcement agencies in antitrust investigations. This could significantly lower the burden of proof on the plaintiff side.

31. Second, public enforcement agency in the past has suspended its investigation after obtaining commitment from the undertaking. However, in the subsequent civil litigation,

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10 A list of recent fines includes Qualcomm (RMB 6 billion), Audi (RMB 258 million), Mercedes (RMB 350 million), and Moutai (RMB 247 million).

11 NDRC fined some insurance companies in Zhejiang province based on charges of monopoly agreements and there are pending private lawsuits in a Chinese court.
a court may assume monopolistic conducts exist and therefore shift the burden of proof to
the defendant for the alleged monopolistic conduct.

32. Third, the documents for self-confession or leniency submitted in the administrative
investigation could be unfavorable evidence in the subsequent civil litigation. Although
enforcement agencies do not have a formal leniency policy, firms under investigation
have cooperated with the enforcement agency by providing evidence and self-confession
in order to lower the penalties. The court may take these self-confessions as evidence and
shift the burden of proof to defendant in the subsequent civil case.

33. Moreover, the threat of subsequent civil litigation may influence firm’s strategy when
it faces agency investigation. Firms may need to take into account of the consequence of
future civil litigation either in a Chinese court or in other jurisdictions. If the threat from
subsequent civil litigation is significant, a firm may be more willing to challenge the
public enforcement agencies instead of accepting the penalties. This could in turn affect
how public enforcement agencies conduct their investigation.

V. Conclusions

34. In this paper, we have attempted to provide a general overview of private antitrust
enforcement in China, including a discussion of the burden of proof and its challenges in
practice, the role of expert witness in a Chinese court, and relationship between private
litigation and public enforcement.

35. Although there are many challenges for private antitrust litigation in China, in
particular the perceived high burdens of proof for the plaintiff side, we have already seen
an increase in civil antitrust litigation cases in China. A number of factors could facilitate
the plaintiff side in the future. First, the active public enforcement could help lowering
the burden of proof if the court could accept the public enforcement decisions as
significant evidence. Second, the plaintiff could learn from the past precedents and use all
the resources available for the preparation and presentation of evidence, including the
appointment of expert witness. As such, we believe that private antitrust litigation could
become increasingly important component of China’s antitrust policy in the near future.
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