

**The Private Damages Action of Competition Law in EU and China**

**Dissertation**

**Zur Erlangung der Würde des Doktors der Rechtswissenschaft der  
Fakultät Rechtswissenschaft  
der Universität Hamburg**

**vorgelegt von**

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**Hamburg 2016**

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Datum des Kolloquiums: 29.06.2016

**I would like to express my deepest gratitude to Prof. Dr. Hans-Heinrich Trute and Prof. Dr. Roland Broemel for their support and guidance throughout the research.**

**Thanks to my parents for the support and the encouragement.**

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## LIST OF ABBREVIATION

AG	Advocate-General
AMC	(Chinese) Anti-monopoly Commission
AM. CRIM. L. REV.	American Criminal Law Review
AML	(Chinese) Anti-monopoly Law
Antitrust Bull.	Antitrust Bulletin
Antitrust L. J.	Antitrust Law Journal
Appeal Rev. Current L. & L. Reform	Appeal Review Current Law & Law Review
ARC	(German) Act against Restraints of Competition (GWB)
BGH	Bundesgerichtshof
CAFD	China Administration of Food and Drug
CCP	Code of Civil Procedure
CDC	Cartel Damage Claim
CFI	Court of First Instance
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
Commission	Commission of the European Communities
CPL	Chinese Civil Procedure Law
CWTO	China Society for World Trade Organization Studies
DG	Directorate General
DoJ	Department of Justice
EC	European Community
E.C.R.	European Court Reports
EC Treaty	Treaty of the European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECUPL Journal	East China University of Political Science and Law Journal
ed. (edt.)	Edit
EEA	European Economic Area
EEC	European Economic Community
ELJ	European Law Journal
EP	European Parliament
E. L. Rev.	European Law Review
EU	European Union
Eur. Competition L. Rev.	European Competition Law Review
Eur. Competition J.	European Competition Journal
EuZW	Europäisches Zeitschrift für Wirtschaftsrecht
EWCA Civ	Court of Appeal Civil Division
EWHC (Ch)	High Court (Chancery Division)
EWS	Europäisches Wirtschafts- und Steuerrecht
Fla. L. Rev.	Florida Law Review

FCO	Federal Cartel Office
GG	(German) Grundgesetz
Global COMPETITION LITIG. REV.	Global Competition Litigation Review
Geo. L. J.	Georgetown Law Review
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Hastings L. J.	Hastings L. J.
HMT	Hypothetical monopolist test
IP	Intellectual Property
IM	Instant messaging
J. Comp. L. & Econ.	Journal of Competition Law and Economics
JZ	JuristenZeitung
LG	Landgericht
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
O.J.	Official Journal of the European Communities
OLG	Oberlandesgericht
OWiG	Gesetz über Ordnungswidrigkeiten
para	paragraph
PCCPL	Professional Committee on Competition Policy and Law
MOC	(Chinese) Ministry of Commerce
NCA	National Competition Authority
NDRC	(Chinese) National Development and Reform Commission
NJW	Neue Juristische Wochenschrift (Zeitschrift)
NJW-RR	NJW-Rechtsprechungs-Report Zivilrecht (Zeitschrift)
No	Number
NPC	National People's Congress
NZKart	Neue Zeitschrift für Kartellrecht
Rev Ind Organ	Review of Industrial Organization
RPM	Resale Price Maintenance
U.S.F. L. Rev.	University of San Francisco Law Review
SAIC	(Chinese) State Administration for Industry & Commerce
SNS	Social Network Site
SSNDQ	small but significant and non-transitory decrease in quality
SSNIP	small but significant and non-transitory increase in price
SOE	State-owned enterprise
SME	Small and medium-sized enterprise
STAN. L. Rev.	Stanford Law Review
StPO	German Code of Criminal Procedure
TEU	The Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TV	Television

UK	United Kingdom
US	United States
Vand. L. Rev.	Vanderbilt Law Review
Wash. U. Global Stud. L. Rev.	Washington University Global Studies Law Review
wbl	Wirtschaftsrechtliche blätter
WTO	World Trade Organization
WuW	Wirtschaft und Wettbewerb
ZPO	Zivilprozessordnung
ZWeR	Zeitschrift für Wettbewerbsrecht

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## Introduction

### I. Background

Both legislators in the EU and in China intended to establish a dual enforcement system in the competition law, including the public and private enforcement in order to enhance the level of the enforcement. In the EU, the private enforcement is based on transforming the centralised model under Regulation 17 (1962) to the decentralised model under Regulation 1/2003, the latter of which strengthened the role of the national court by applying Articles 101(1) and 102 TFEU directly.<sup>1</sup> The right to obtain the compensation relying on the breach of Articles 101 and 102 by individuals has been confirmed by the Court of Justice in the case *Courage and Crehan*.<sup>2</sup> Following the case law of the Court of Justice, the Commission initiated the work of legislation by issuing a Green Paper and a White Paper, as well as the Staff Working Paper on the antitrust damages action.<sup>3</sup> In 2013, the Commission proposed a Directive regarding the antitrust damages action which summarised the achievements in the White Paper and entered into force in December 2014 through the ordinary legislative procedure. It should be noted that granting damages is the only remedy the aggrieved persons can achieve via private enforcement. In most of Member States, individuals can also claim for the termination of the illegal agreements or behaviours, the injunction, the restitution or other relieves under the national civil procedure law. Likewise, the private enforcement is not just limited to the civil litigation. The consensual dispute resolution issued in the EU's Directive such as settlement can also offer the parties with the opportunities to pursue their damages. This, however, only applies, if an antitrust damages action is effective for injured persons in the enforcement system as a guarantee; other redress approaches could be available and therefore the deterrent effect suffices.

In China, the legal ground of the private enforcement can be found in Article 50 of Chinese Anti-Monopoly Law (2008). In 2012, the Chinese Supreme Court released a Judicial Interpretation on AML in order to better interpret Article 50 and facilitated the private civil actions being brought before the courts in China.<sup>4</sup> The Judicial Interpretation on AML contains the basic provisions for civil actions, focusing on the standing of injured persons, civil remedies and the burden of proof in particular.

Compared to the long history of the private enforcement of antitrust law in the US, the private enforcement in both the EU and China can hardly be deemed as complete and full-fledged. Under such 'underdevelopment' circumstance, there are some common questions and obstacles for the EU and China are unavoidable; they have also been defined in the legislature proceedings: (i) the relationship between public and private enforcement; (ii) the standing of

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<sup>1</sup> EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *Official Journal* 013, 21/02/1962 P. 0204 – 0211; 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, *Official Journal* L 001, 04/01/2003 P. 0001 – 0025

<sup>2</sup> C-453/99, *Courage and Crehan* [2001], E.C.R. I-06297

<sup>3</sup> Commission GREEN PAPER on Damages actions for breach of the EC antitrust rules COM(2005) 672 final; COMMISSION STAFF WORKING PAPER Annex to the GREEN PAPER SEC(2005) 1732; WHITE PAPER on Damages actions for breach of the EC antitrust rules COM(2008) 165 final; COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules SEC(2008) 404

<sup>4</sup> Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conduct, 01/06/2012, (最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定 01/06/2012, zuigao renmin fayuan guanyu shenli yin longduan xingwei yingfa de minshi jiufen anjian yingyong falv ruogan wenti de guiding 01/06/2012)

indirect purchasers to sue; (iii) the evidence procurement and the economic evidence.

## II. Purpose and Plan of this Paper

This Paper will focus on the main questions and obstacles mentioned above as well as introduce the procedural rules concerned with the private antitrust action in China and the EU respectively in Chapters A and B. Firstly, the procedural rules in China are mainly governed by the Chinese *Civil Procedure Law 2013* (民事诉讼法) and its *Judicial Interpretation on Evidence 2001*.<sup>5</sup> In the EU, Member States have two years to transform it into the national law after adopting the Directive. In addition, other issues that are not prescribed in the Directive should also apply to the national law of the Member States. Secondly, the legislators in the EU and China inclined to create a relatively broad right to pursue the compensation. In the EU, the Court of Justice stated in *Courage and Crehan* that any person who suffers the damages due to the breach of Community competition law should be granted with the right to pursue and obtain the compensation.<sup>6</sup> In China, the scope of the underlying claimant in the light of Article 1 of the *Judicial Interpretation on AML* is even broader than the provision in the EU Directive since it contains not only the loss suffered by the victims due to a breach of AML, but also the person's claim whose interests are disputed by the offenders. In the market, the major interested parties could be the purchasers, suppliers and competitors that encounter difficulties when they establish their claims. The positions of suppliers are somewhat similar to that of the purchasers. The deadweight loss customers and umbrella customers could be the real victims, but in general it is difficult for them to establish their damages according to the past experiences. Hence, the standings of purchasers (direct and indirect purchasers) and competitors constitute the main subjects discussed in this paper. Thirdly, it cannot be denied that the information asymmetry is one of the biggest obstacles for the injured persons when it comes to bringing the action. Most of the crucial evidence may be in the hands of the other parties or competition authorities. The EU's Directive and Chinese Judicial Interpretation on AML prescribe the disclosure and shifting the burden of proof in order to lighten the burden of the claimant on the evidence. Ultimately, the relationship between the private and public enforcement is one of the important questions that can hardly be ignored; they incur the questions such as the role of private enforcement, the cooperation of public and private enforcement and the application of the law in coherent manner between the competition authorities and the courts in a coherent manner. In Chapter C, the most discussed troublesome problems will be discoursed including the application of economic evidence, the indirect purchaser litigation and the relationship between the private and public enforcement.

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<sup>5</sup> Some Provisions of the Supreme People's Court on Evidence in Civil Procedures 2001, (最高人民法院关于民事诉讼证据的若干规定, zuigao renmin fayuan guanyu minshi susong zhengju de ruogan guiding)

<sup>6</sup> C-453/99, *Courage and Crehan* [2001], E.C.R. I-06297, para 43

## Chapter A Antitrust damages action in China

### I. Overview of the Anti-monopoly law in China

#### 1. The Anti-Monopoly law

China has introduced the Anti-Monopoly Law (*hereinafter*, AML) in August 2008. In fact, the history of the legislation of AML goes back to 1980, in which the Chinese State Council proposed the need for an AML legislation in *the Interim Provisions on Carrying Out and Protecting Socialist Competition* (关于开展和保护社会主义竞争的暂行规定).<sup>7</sup> The national people's congress, which is the legislator of china, promulgated *the Law against Unfair Competition* (反不正当竞争法) in 1993. The law prohibited: (i) the exclusive purchasing by public utilities and undertakings which possess the dominant position (Article 6); (ii) abuse of the government's administrative power in connection with the exclusive purchasing and regional protection (Article 7); (iii) predatory pricing conducts (Article 11); (iv) the tying (Article 12); and (v) the bid-rigging (Article 15).<sup>8</sup> *The Pricing Law* (价格法) which came into effect in 1998 contains some relevant provisions regarding the prohibition of the restrictive agreement (Article 14).<sup>9</sup> Although these provisions were the first and the most important competition law in the 1990s, they are inadequate as to the current monopoly situation. *The Tendering and Bidding Law* (2000)(招标投标法) prohibits the bid-rigging in Article 50 and other behaviours of competitive restriction in Article 51.<sup>10</sup> But these scattered provisions do not suffice as to the development of the Chinese market in 21st century, especially since China has joined the WTO.

#### 2. Legal framework of AML

Articles 1 to 12 are the general provisions of AML. Among them, Article 1 provides the goals of the AML including: (i) preventing and prohibiting monopolistic behaviour; (ii) protecting the fair competition; (iii) promoting the efficiency of economic operations; (iv) protecting the consumer interest and the public interests; (v) promoting the healthy development of the socialist market economy. Article 2 provides the territorial scope of the provisions in AML, i.e. within the Chinese market. Article 3 prescribes the definition of monopolistic behavior, including the agreement, the abuse of dominance and the merger. Articles 4, 5 and 6 provide the principles of AML, the merger and the prohibition of abuse of dominant position respectively. Articles 7 and 8 govern the compliance of AML by undertakings in specific industries (especially the SOEs) and by government as well as related organizations. Articles 9 and 10 provide the rules in connection with the establishment of the competition authorities. Article 11 governs the role of the trade association in the competition. Article 12 defines the

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<sup>7</sup> Chinese State Council, Interim Provisions on Carrying Out and Protecting Socialist Competition (关于开展和保护社会主义竞争的暂行规定, guanyu kaizhan he baohu shehui zhuyi jingzheng de xianxing guiding), 1/12/1980 No. 16, 487-489

<sup>8</sup> The Law against Unfair Competition (1993), Articles 6, 7, 11, 12 and 15; the English version of the Chinese law can be found in China Congress website: <http://www.npc.gov.cn/englishnpc/Law/FrameSet-page.html>

<sup>9</sup> The Pricing Law (1998), Article 14

<sup>10</sup> The Tendering and Bidding Law (2000), Articles 50 and 51

conceptions of the ‘*undertaking*’ and the ‘*relevant market*’. Agriculture is the only sector that does not apply the AML in accordance with Article 56, which is common in OECD countries.<sup>11</sup>

#### **a. Prohibition on the restrictive agreement**

Subsection 2 of Article 13 of AML provides that ‘*monopoly agreements can be defined as agreements, decisions and other concerted conducts which have been designed to eliminate or restrict competition.*’ The categories of the horizontal agreement, a provision is banned in Article 13, incorporate price fixing, quantity fixing, market partitioning, innovation limiting, boycott and agreement operated by or through the trade associations. Pursuant to Article 14, the vertical restraints include the minimum resale price (RPM) as well as other behaviours determined by authorities. Article 15 is the exemption rule, which provides undertakings the exemption. The 7 pre-conditions (of the exemption) are related to the public interest, innovation or the interest of SMEs. At the same time the agreement will not severely restrict the competition in the market and it will result in a benefit shared with the consumer. Article 15 did not lay down an *ex ante* notification for the application of the exemption, which means the undertaking should assume the burden to prove that their agreement can satisfy the pre-conditions in both the public and private enforcement. There is no *per se* illegal provision in AML as Article 15 literally states that the exemption can be applied to both the horizontal and the vertical agreement prescribed in Articles 13 and 14. It implies that even a price fixing cartel may still have the opportunity to obtain an exemption according to Article 15. In theory, it is difficult for the price fixing cartel to satisfy the pre-conditions of the exemption. But this rule virtually leaves a relatively large room of discretion for competition authorities and courts to determine the legality of the price fixing cartel. The case *Shenzhen Huiexun v. Shenzhen Pest Control Association*<sup>12</sup> is an example; Shenzhen intermediate court confirmed the exemption of a horizontal price fixing cartel by stating that the arrangement on the insecticide service related to the protection of the environment (the public interest) falls within Subsection 1 (4) of Article 15 of AML. Although the opinion on exemptions was dropped in the appeal, the court of appeal still opined that this horizontal price fixing arrangement did not have ‘*the effect on eliminating or restricting the competition*’ in the relevant market. The forbidden of *per se* illegal provides the offenders with the opportunities to defend for their behaviour, but it also creates some uncertainties as to determining the illegality of the severe horizontal arrangement. In addition, the trade associations should not engage with the conducts prohibited by the Articles 13 and 14.

#### **b. Prohibition on the abuse of dominance**

The undertaking that has the strong market power may have the capability to control or affect the prices or quantities of commodities or other transaction terms in a relevant market, or to prevent or exert an influence on the access of other undertakings to the market, which may result in inefficiency or may charge supra-competitive prices in the long term. Articles 12, 17, 18 and 19 of the AML provide the definition of the abusive conducts and other basic factors on estimating the dominant position. Firstly, subsection 2 of Article 12 provides the definition for the relevant market, which is complemented by the *Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market 2009* regarding the detailed methods of delineation of the relevant market that can be used in the enforcement.<sup>13</sup> The relevant market

<sup>11</sup> See Allan Fels, ‘China’s Antimonopoly Law 2008: An Overview’, *Rev Ind Organ* (2012) 41:7–30, 15

<sup>12</sup> *Shenzhen Huiexun v. Shenzhen Pest Control Association*, High People’s Court of Guangdong, Guangdong Final Commerce [2012] No.155 ([2012] 粤高法民三终字 155 号), Chinese version available at: [http://www.pkulaw.cn/case/pfnl\\_118496821.html?match=Exact](http://www.pkulaw.cn/case/pfnl_118496821.html?match=Exact)

<sup>13</sup> Subsection 2 of Article 12 of AML; Guide of the Anti-Monopoly Committee of the State Council for the

is defined as ‘a geography and product market, in which undertakings compete with each other to provide a certain commodity or service in a certain period of time.’<sup>14</sup> Secondly, subsection 1 of Article 17 is an enumeration of the abusive behaviour, including excessive pricing, predatory pricing, refusal to deal, exclusive dealing, tying and other unfair dealing conditions, margin squeeze (including the price discrimination), other behaviours determined by the competition authorities.<sup>15</sup> Subsection 2 of Article 17 provides the definition for the dominant position ‘capable of controlling the prices or quantities of commodities or other transaction terms in a relevant market, or preventing or exerting an influence on the access of other undertakings to the market.’<sup>16</sup> This Subsection intends to point out the essential factors in assessing the market power of the undertaking in a sketchy way, because a comprehensive enumeration of all the elements concerning the market power is impossible. Thirdly, Article 18 provides the factors should be taken into account when determining the dominant position of the undertaking.<sup>17</sup> The factors include: i) the market share and the market structure; ii) the undertaking’s ability to manipulate their upstream or downstream market; iii) the undertaking’s financial or technical capability; iv) the dependence of the related undertakings on the transaction with the undertaking; v) entry barrier; vi) other related elements.<sup>18</sup> Finally, Article 19 provides the rules regarding the threshold of the market share as an indicator on the rebuttable presumption of dominance.<sup>19</sup> The undertaking can be presumed to have dominance, provided that: i) the market share of one undertaking amounts to 1/2 of the total market; ii) that of two undertakings amounts to 2/3; iii) that of three undertakings amounts to 3/4.<sup>20</sup> The undertaking should be deemed as non-dominant where the market share is less than 10%.<sup>21</sup> Apart from these, undertakings have the right to prove the nonexistence of the dominant position.<sup>22</sup>

### c. Mergers and concentrations

Articles 20-31 are provisions providing the rules on merger, including the definition, the notification and the assessment of mergers and concentrations.

### d. Prohibition on the abuse of administration power

The state bodies and organizations (public affairs)<sup>23</sup> should be prohibited from subscribing to behaviours that may restrict or eliminate competition in the market. These illegal behaviours contain exclusive dealings, seal of market, unfair conditions on bidding and on investment or setting a branch and other monopoly behaviour discussed above.<sup>24</sup> One of the notable characteristic of AML is the prohibition of the abuse of administrative power on competition. It is embedded in the economic background that the transformation of China from central planning to market economy (with socialist characteristics) since 1978. One of the major

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Definition of the Relevant Market, Anti-Monopoly Committee of the State Council, 2009

<sup>14</sup> *Ibid*, Subsection 2 of Article 12

<sup>15</sup> Article 17 of AML

<sup>16</sup> Subsection 2 of Article 17 of AML

<sup>17</sup> Article 18 of AML

<sup>18</sup> Article 18 of AML

<sup>19</sup> Article 19 of AML

<sup>20</sup> Subsection 1 of Article 19 of AML

<sup>21</sup> Subsection 2 of Article 19 of AML

<sup>22</sup> Subsection 3 of Article 19 of AML

<sup>23</sup> The AML aims to eliminate the illegal conducts on the competition by Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs.

<sup>24</sup> Articles 32-37 of the AML

problems of the administrative monopoly is that the government's abuse of power as to improving some undertakings' position in the market. Two notable types of the administrative monopoly are regional blockage and industrial blockage.<sup>25</sup> Beer is a good example for the regional blockage.<sup>26</sup> Most beer brands in China can only achieve good selling figures in their hometowns because of the regional protectionism. In addition, industrial blockage is protected under the Article 7 of AML. It has been widely recognized that the administrative monopoly in China cannot be eliminated by AML alone, which further needs the safeguarding of the economic democracy and the removal of government intervention in the market.<sup>27</sup>

#### **e. Public and private enforcement of AML**

##### **aa) Public enforcement**

##### **(1) The competition authorities**

Before the AML came into effect in 2008, three authorities were taking charge of the enforcement of the issues in connection with the antitrust law respectively: the Ministry of Commerce (MOC), the National Development and Reform Commission (NDRC), and the State Administration for Industry & Commerce (SAIC). NDRC has implemented the Price Law and price regulations in China over the past decades and MOC has a lot of experience in the merger control. SAIC is a major authority engaged in enforcing the Unfair Competition Law. Hence, some struggles as to the competence and powers of the enforcement among the three authorities were experienced during the legislation period. The likelihood of a single authority with exclusive power enforcing AML has been discussed in order to ensure the efficiency of the enforcement. However, this expectation (of the single competition authority) failed to be realized. Instead, across the three authorities (NDRC, MOC and SAIC), the Anti-monopoly Commission (AMC) that aims to co-ordinate the enforcement effect of three competition authorities has been established and is governed under Article 9 of AML.<sup>28</sup> On the one hand, the guidelines released by AMC are normally connected with common issues in the enforcement, which can be applied by three authorities, such as the Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market (hereinafter, the Guide on the Relevant Market). On the other hand, its competence as to coordination means that the AMC is able to encourage and promote a uniform application of AML among these three public authorities.

The present structure of the authorities consists of three levels of governance. The first level is the AMC. Under the AMC, three authorities (NDRC, SAIC and MOC) have been empowered by the State Council respectively to enforce AML as the second level. Their competences can be found in Figure 1 below respectively. According to Subsection 2 of Article 10, the related government body at the provincial autonomous level and the municipal level (local and regional subdivision) to undertake the enforcement work of AML as the third level, if appropriate and

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<sup>25</sup> See Giacomo Di Federico, 'The New Anti-monopoly Law in China from a European Perspective', *World Competition* 32, no. 2 (2009), 262

<sup>26</sup> See Fei Deng, Gregory K. Leonard, 'Incentives and China's New Antimonopoly Law', *Antitrust Magazine* 22.2 (2008), 73

<sup>27</sup> See Xiaoye Wang, 'Issues Surrounding the Drafting Of China's Anti-Monopoly Law', 3 *Wash. U. Global Stud. L. Rev.* 2004, 293

<sup>28</sup> In China, the highest legislative organ is the National People's Congress (NPC). The highest state administration organ is the State Council. The competence of AMC is prescribed in Article 9 of AML. The NDRC, SAIC and MOC and their competences are authorized and empowered by the State Council according to Article 10.

by the delegation of the three authorities. Virtually, AMC and the local and regional subdivisions cannot be deemed competition authorities. Only the three authorities that actually take charge of the investigation and adjudication are the proper public competition authorities. AMC did not investigate and make the decision on a specific case. The local and regional subdivisions do not have the power and competence of the enforcement; they only provide the necessary assistance under the delegation by the three authorities (such as assistance regarding the reduction of the three authorities' workload).

Figure 1: the structure of the public enforcement

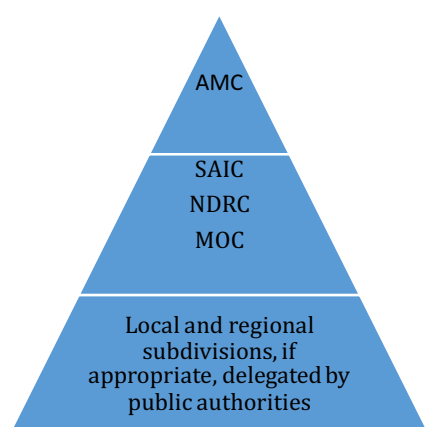


Table 1: the respective competence of the three authorities

Authorities	Competent Offices	Duties
MOC	Anti-monopoly Bureau	Merger review
NDRC	Price Supervision, Examination and Anti-monopoly Bureau	Horizontal or vertical price agreement and the abusive behaviour of the dominant position in respect to the price
SAIC	Antimonopoly and Anti-unfair Competition Enforcement Bureau	Abusive behaviour of dominance, non-price agreement, and abuse of administrative power

#### Provisions for enforcement<sup>29</sup>:

**Provisions against Price Fixing** (反价格垄断规定, fan jiage longduan guiding), Order No. 7 of NDRC 29/12/2010

**Provisions on the Administrative Procedures for Law Enforcement against Pricing Fixing** (反价格垄断行政执法程序规定, fan jiage longduan xingzheng zhifa chengxu guiding), Order No.8 of NDRC 29/12/2010;

**Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements** (工商行政管理机关禁止垄断协议行为的规定, gongshang xingzheng guanli jiguan jinzhi longduan xieyi xingwei de guiding), Order No.53 of SAIC 31/12/2010;

**Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position** (工商行政管理机关禁止滥用市场支配地位行为的规定, gongshang xingzheng guanli jiguan jinzhi lanyong shichang zhipei diwei xingwei de guiding), Order No.54 of SAIC 31/12/2010;

<sup>29</sup> The English version of these Provisions can be found at: <http://lawinfochina.com/Search/SearchLaw.aspx>

*Provisions for the Industry and Commerce Administrations to Stop Acts of Abusing Administrative Power for the Purpose of Eliminating or Limiting Competition* (工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定, gongshang xingzheng guanli jiguan zhizhi lanyong xingzheng quanli paichu xianzhi jingzheng xingwei de guiding), Order No.55 of SAIC 31/12/2010;

*Provisions of the State Administration for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition* (国家工商管理总局关于禁止滥用知识产权排除、限制竞争行为的规定, guojia gongshang guanli zongju guanyu jinzhi lanyong zhishi chanquan paichu xianzhi jingzheng xingwei de guiding), Order No. 74 of SAIC 07/04/2015

## **(2) Investigation and adjudication**

Chapter VI of AML (Articles 38 to 45) provides the investigation and adjudication proceedings of the public enforcement. As mentioned above, competition authorities have the power to investigate and make the decision regarding penalties for the undertaking. To be specific, the public enforcement authorities have competences concerning: a) the investigation of the agreement or the behaviour; b) making a final decision pursuant to the result of the investigation; c) carrying out a punishment on the violators; d) the examination and approval of mergers or concentrations; e) laying down regulations regarding the enforcement of the AML.<sup>30</sup> The proceeding of public enforcement can be divided into four stages: first of all, authorities can start a proceeding based on its own initiative or the complaint brought by private parties (Article 38). Secondly, authorities may gather evidences and information from the undertaking, such as by means of entering the premises of undertakings or other places concerned, requesting the interested persons or examining documents (Article 39). Thirdly, during the period of the investigation, undertakings can reach a commitment with authorities aiming to suspend the investigation (Article 45). During the course of the suspension, the proceeding of investigation will be closed, if undertakings eliminate the effects of the violation in the market;<sup>31</sup> if not, then the proceeding will continue.<sup>32</sup> Finally, authorities make and release a decision of penalties if it is found that the conduct should be prohibited by AML, including the termination of the infringement and a fine.<sup>33</sup> Articles 40 and 41 govern the limitation of the competition authorities' power regarding the due process of the investigation and the protection of the confidential information.<sup>34</sup> Articles 42 and 43 determine the obligations and the rights of the alleged undertakings, the interested parties and the third parties. They have the obligation to comply with the investigation and cannot reject or hamper it (Article 42). Likewise, they also have the right to submit their allegation and contest the facts and the evidence (Article 43).

## **(3) Penalties**

Chapter VII of AML (Articles 46 to 54) provides the rules of the penalties that can be imposed on the restrictive agreement, abuse of dominant position and the illegal concentration of the undertakings. As regards the prohibition of the restrictive agreement, including horizontal and vertical agreement, the competition authorities (SAIC or NDRC) can request the undertaking to terminate the violations, confiscate their illegal gains and impose a fine of 1% to 10% of the total turnover during the preceding business year (Article 46, Subsection 1). The fine imposed on the restrictive agreement that has not been enforced should be limited to no more than

<sup>30</sup> Yanbei Meng, Anti-monopoly law, (反垄断法, fanlongduanfa), Peking University Press, 2011, 264-267

<sup>31</sup> Yanbei Meng, *supra* n 30, 264-267

<sup>32</sup> Yanbei Meng, *supra* n 30, 264-267

<sup>33</sup> Articles 46 and 47 of AML

<sup>34</sup> Articles 40 and 41 of AML

¥500,000Yuan (Article 46, Subsection 1). The competition authorities can impose a fine of no more than ¥500,000Yuan on the trade association where the restrictive agreement was organized by the trade association (Article 46 Subsection 3). The registration of the trade association can be revoked in the severe cases (Article 46 Subsection 3). Subsection 2 of Article 46 provides the leniency program whereby the co-operated undertaking can obtain immunity or a reduction of the fine (Article 46 Subsection 2). Likewise, competition authorities can request the offender to terminate the abusive behaviour of the dominant position, confiscate the illegal gain and impose a fine of 1% to 10% of the total turnover of the preceding business year (Article 47). Competition authorities have a considerable discretion concerning the amount of fine, yet only if it does not exceed its ceiling of 10% of the total turnover in Mainland China.<sup>35</sup> The severity of fines depends on the discretion of the competition authorities taking account of the gravity, the seriousness and the duration of the violations (Article 49). Article 48 provides the sanction on the illegal concentration of undertakings. Competition authorities have no power to impose any penalties on the administrative monopoly, they can only submit suggestions as to the removal of the administrative monopoly to the relevant superior bodies of the alleged state body which abuses its administrative power (Article 51 Subsection 1). Sanctions regarding hindrance of the investigation committed by undertakings are prescribed in Article 52. If the offenders reject the decision and penalties imposed by the competition authorities, they can either apply for an administrative reconsideration (a review of the decision by the authorized state body) or file an administrative action before court directly (Article 53 Subsection 2). The only exception is the sanction imposed on the illegal concentration, which places the administrative reconsideration as a prerequisite of the administrative action (Article 53 Subsection 1). Article 54 provides the criminal or administrative liabilities of the officials of competition authorities concerning the abuse of their power.

#### **(4) Shortcomings of the Chinese public enforcement**

A common shortcoming of the public enforcement in China and most of the European countries is the limited financial and man-powered resource available to spend on enforcement, compared to the substantial underlying violations. It cannot be denied that the investigation of the collusion or the abuse of the dominant position is normally expensive and time-consuming. According to a related report, the MOC comprising 30 administrative staffs members in 2011, is the authority with the largest amount of staffs.<sup>36</sup> SAIC staff make up no more than 10 persons.<sup>37</sup> When considering other countries' public authorities and the market size, input in the Chinese enforcement system is evidently insufficient.

In addition to the limited resource, the parallel application of Articles 13, 14 and 17 (the prohibition of the restrictive agreement and abuse of the dominant position) by SAIC and NDRC may result in conflicts and inconsistent decision making.<sup>38</sup> The conflicts occur in situations where both authorities have the jurisdiction over the same case by their enforcement regulation respectively. Some doubts that the preference of the competition authorities on applying the law and the considerable discretion on imposing a fine may aggravate the conflicts and legal uncertainty.<sup>39</sup>

<sup>35</sup> AML did not provide the geographical scope of the calculated turnover. According to the settled cases, the fine is basically bound in the scope of Mainland China market.

<sup>36</sup> See Xiaoye Wang, 'The Three-year Anti-monopoly Enforcement in China and Rule of Law', in Report on Competition Law and Policy of China 2011 (Law Press-China, 2012).

<sup>37</sup> See Xiaoye Wang, *supra* n 36

<sup>38</sup> The arguments can be found in see Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective', 56 *Antitrust Bull.*, 2011, 640-641;

<sup>39</sup> see *ibid*, 640-641; the author cited the paper manufacturing association case as an example, which triggered the initiatives on investigation by NDRC and SAIC in the meanwhile and fell within the jurisdiction of NDRC.

It can also be found that Chinese competition authorities exert considerable discretion on the investigation and make the final decision. The doubts concerning this considerable discretion are based on the vagueness of the language of AML, the lack of independence of competition authorities, the non-transparency of the investigation and decision-making, as well as the lack of an effective judicial review of the decision.<sup>40</sup> For instance, one of the major competences of NDRC is to draft the economic and industrial policies which may cause some essential conflict regarding its independence in terms of enforcing AML.

As mentioned above, Article 7 of AML seems to provide some protection of the specific industries; it 'is controlled by the state-owned economy and is vital to the national economy and national security' and industries which have the 'exclusive operations and sales according to the law'.<sup>41</sup> Accordingly, competition authorities have no competence as to enforcing a case in connection with these specific industries. In fact, specific industries in China refer to 'strategic sectors' such as national defence, telecommunications, petroleum and petrochemicals, coal, electricity, water transportation and civil aviation. Those industries are almost entirely controlled by SOEs which have the absolute market power and overlap with natural monopolies. These specific industries are governed and supervised by the state, not by competition authorities in the light of Article 7. Furthermore, Subsection 2 of Article 7 requests the undertakings to comply with the law, 'in strict self-discipline' and 'supervised by the public'. Besides the specific industries, competition authorities are still incompetent in regards to the administrative monopoly, i.e. state bodies abuse their power to restrict or distort competition. They only have the competence to submit the recommendations related.

## **bb) Private enforcement**

Apart from the public enforcement, undertakings committing a violation of the AML should also bear the civil liabilities for the loss suffered by the other party or parties (Article 50). Private enforcement will be discussed below.

## **II. Rules of the Chinese antitrust damages action**

### **1. Private antitrust action in China**

Article 50 of AML provides the legal basis for the private enforcement, which promulgated '*the undertakings shall bear civil liabilities according to the law, if their monopolistic conduct has caused loss to another person*'. *Provisions on Several Problems of the civil litigations caused by the monopoly conduct laid down by the Supreme Court* (hereinafter, Judicial Interpretation on AML) in 2012 as a judicial interpretation of the AML provided some procedural rules on antitrust actions. It includes the definition of the antitrust litigation, the standing of the claimant, types of action, the jurisdiction, burden of proof, civil liabilities and the limitation period.<sup>42</sup> As

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<sup>40</sup> Wang Xiaoye, On the Antitrust Law (论反垄断法, lunfanlongduanfa) (Social Sciences Academic Press(China) 2010), 412-414; see Thomas Brook, 'China's Anti-Monopoly Law: History, Application, And Enforcement', 16 *Appeal Rev. Current L. & L. Reform* 31 2011, 40-41

<sup>41</sup> Article 7 of AML

<sup>42</sup> Press Release about the Provision on Several Problems of the civil litigations caused by the monopoly conduct by the Supreme People's Court 2012 ( 最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定的新闻发布稿 zuigao renmin fayuan guanyu shenli yin longduan xingwei yinfa de minshi jiufen anjian yingyong falv ruogan wenti de guiding de xinwen fabugao)

far as the complexity of antitrust actions is concerned, 16 provisions do not sufficiently address the entire body of the problems. Private enforcement is calling for the detailed rules from the legislator and the Supreme Court in the future.

## 2. Goals of the antitrust damages action

In the Supreme Court's *Response to Reporters' Requests on the Draft for Comments of the Judicial Interpretations of the Anti-Monopoly Law*, it confirmed that

'on the one hand, (the Judicial Interpretation on AML intends) to specify the rules and facilitate the litigation in order to function and take full advantages of antitrust civil litigation, to promote the consciousness and mind of people on competition. On the other hand, over-deterrence and restraint on market activities should be avoided. Likewise, the administrative enforcement and civil litigation should be co-ordinated to ensure optimal enforcement.'<sup>43</sup>

### a. Compensation

Harming private parties is inevitable due to the anti-competitive conduct. For example, purchasers may have to endure a supra-competitive price because of the cartel. The competitors may suffer a loss in regards to the decreased market share resulting from the predation by the dominant undertaking. The competition law does not preclude a direct protection on consumers and competitors.<sup>44</sup> The protection of the interest of consumer is one of the primary goals of the AML which is stipulated in the Article 1.<sup>45</sup>

The Article 50 of the AML confirmed that the undertakings should bear civil liabilities where they committed into the monopolistic conduct and caused the loss to others.<sup>46</sup> The relevant civil liabilities include: cessation of infringement, elimination of dangers, return of property, restoration of original condition, compensation for loss, payment of breach of contract damages, elimination of ill effects and apology.<sup>47</sup> Virtually, Article 50 provides an individual right to compensatory relief based on the breach of AML. Moreover, it cannot be denied that the compensatory relief creates a considerable incentive for the private parties to file the action. In addition, it should be noticed that the monopolistic conduct is governed in Article 3 of AML consisting of the horizontal and vertical agreement, abuse of dominant position and undertaking's concentration. But the relied provisions of private action are usually Articles 13, 14 and 17 (on the restrictive agreement and abuse of dominant position). Likewise, Article 1 of the Judicial Interpretation on AML addresses two forms of the cause of action consisting of a claim for damages caused by the anti-competitive behaviour and a claim for dispute on the

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<sup>43</sup> Responses to Reporters' Requests on the Draft for Comments of the Judicial Interpretations of the AML from a Superintendent of Intellectual Property Tribunal of Supreme People's Court, (最高法院知识产权庭负责人就司法解释征求意见稿问答, zuigaofayuan zhichanting fuzeren jiu sifa jieshi zhengqiu yijiangao dawen), 2011/04, available at [http://rmfzb.chinacourt.org/paper/html/2011-04/26/content\\_26384.htm](http://rmfzb.chinacourt.org/paper/html/2011-04/26/content_26384.htm).

<sup>44</sup> *Ibid.*

<sup>45</sup> Article 1 of AML

<sup>46</sup> Article 50 of AML

<sup>47</sup> Article 134 of the General Principle of the Civil Law provides that the forms of civil liabilities include: cessation of infringement, removal of obstacles, elimination of dangers, return of property, restoration of original condition, repair, reworking or replacement, compensation for loss, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation and apology.; Article 15 of the Tort Law; Article 14 of Judicial Interpretation on AML.

agreement and other collusive practices, which confirms the role of the compensation in antitrust actions.<sup>48</sup>

#### **b. Complement to ineffective public enforcement**

In a state with public enforcement playing a crucial role in the whole enforcement system, one of the significance of private enforcement is to complement the shortcomings of the public enforcement. Firstly, it can make up the limited resource and budget of competition authorities in regards to enforcement and increase the detection rate of the concealed or non-concealed monopolistic conduct. Monopolistic conduct such as restrictive agreement is usually concealed and cannot be easily detected. Private parties that suffered the loss due to the monopolistic conduct may have the incentive to uncover the violation.

Secondly, private action has a far-reaching impact on the Chinese market and the shortcomings of competition authorities in particular. Private parties are able to file an action proactively regardless of whether competition authorities have initiated an investigation, or whether they have made a non-transparent, unreasonable decision. Besides, the private enforcement in China is effective against the market power of SOEs and the administrative power of state bodies.

#### **c. Additional deterrence**

There is no doubt that the public enforcement aims to create a deterrence by means of a fine and confiscation of the illegal gain of the undertaking. But the criticism that due to a lack of an absolute independence of public authorities the public enforcement cannot achieve an appropriate deterrence level. Likewise, private enforcement may increase the detection rate of the concealed monopolistic conduct and the likely amount of sanctions (including a fine and damages).

### **3. Provisions of the antitrust damages action**

#### **a. Provision in AML concerning the antitrust damages action**

##### **aa) Protection of consumer interest in Article 1 of AML**

It cannot be denied that competition plays a key role in the market economy, which produces some positive results, namely higher economic efficiency and better allocation of resources. Members of the market will benefit from the competition, especially the consumer. The antitrust law provides consumers with possibilities to obtain products of the best quality and lowest price as well as ensures the right to choose in the market by the prohibition of anti-competition behaviour. For example, the prohibition of a horizontal fix-price agreement under Article 13 of AML will avoid an illegal price suffered by consumers, which can be identified as ‘AML

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<sup>48</sup> Article 1 of the Judicial Interpretation on AML

benefits consumers'.<sup>49</sup> Similar to the competition law of other countries, AML confirmed expressly that the protection of consumer interest is one of the most important tasks in Article 1 of the Law. Article 1 provided goals of competition law in China with expressions such as '*this Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of the socialist market economy.*'<sup>50</sup> The four goals of AML can be concluded as: a) protection of fair competition; b) enhancement of economic efficiency; c) protection of consumer interest; d) protection of social interest.<sup>51</sup> The legislator confirmed the significance of the protection of consumer interest as well as protection of social interest, which is defined as ultimate goals in Chinese competition law according to Article 1.<sup>52</sup> Consumers may suffer the harm because of a conspiracy or an abuse behaviour which violated the competition law. In this respect, reaping redress for the harm sustained is vital. As aforementioned, the private enforcement provides the opportunity for the redress of consumers, which plays a significant role in the enforcement system of Chinese AML.

## bb) Civil liabilities in Article 50 of AML

Article 50 of AML is the legal basis for the private enforcement, which provides the possibility for an application of private antitrust action before courts in China by words such as '*Where the monopolistic conduct of an undertaking has caused loss to another person, it shall bear civil liabilities according to the law.*'<sup>53</sup> The legislator did not choose to offer a clear answer as to who can bring an antitrust action in Article 50. They dodged the difficulty by describing this Article from the perspective of liabilities--- '*infringers shall undertake civil liabilities*'.

The forms of civil liabilities include: cessation of infringement, removal of obstacles, elimination of dangers, return of property, restoration of original condition, repair, reworking or replacement, compensation for loss, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation, extension of apology.<sup>54</sup> No punitive damage is awarded pursuant to Chinese Tort Law and AML. The compensation consists not only of the damage, but also the costs spent by the claimant on the litigation.<sup>55</sup> According to Article 19 of the Chinese Tort Law, damages to property are calculated as per market price at the time of the infringement.<sup>56</sup>

<sup>49</sup> Yanbei Meng, *supra* n 30, 36.

<sup>50</sup> Article 1 of AML.

<sup>51</sup> See Maozhong Ding, 'On the functions and its optimization of antitrust law (反垄断法的目标选择及其功能优化刍议, fanlongduan fa de mubiao xuanze jiqi gongneng youhua chuyi)', *Modern Finance and Economics*, 08/2011, 128

<sup>52</sup> See Xiaoye Wang, 'Goals of Chinese Antimonopoly Law (我国反垄断法的宗旨, woguo fanlongduanfa de zongzhi)', *ECUPL Journal*, 2008(2), 98-99; the author believed that direct goals of AML can be defined as '*the prevention and prohibition of monopoly behaviour and protection of competition*'. By means of the achievement of direct goals, the law aims to promote the optimization of resource allocation and incentivise the improvement of the productive efficiency of the enterprise. Ultimate goals include the enhancement of economic efficiency, the protection of consumer interest and the protection of social interest.

<sup>53</sup> Article 1 of AML

<sup>54</sup> Article 134 of the General Principle of the Civil Law; Article 15 of the Tort Law; Article 14 of Judicial interpretation of AML

<sup>55</sup> Article 14 of AML

<sup>56</sup> Article 19 of Chinese tort law provides that '*Where a tort causes any harm to the property of another person, the amount of loss to the property shall be calculated as per market price at the time of occurrence of the loss or calculated otherwise.*' The Draft of the Judicial Interpretation on AML indicated in its Article 2 the jurisdiction of the antitrust action by using the term 'tortious or contractual dispute resulted from the monopolistic behaviour'. This term was basically followed by the term 'tortious or non-tortious proceeding' in the final Responses to Reporters' Requests of the Judicial Interpretation.

## **b. Provisions in the Judicial Interpretation on AML**

### **aa) Types of proceedings**

Article 1 of the Judicial Interpretation on AML provides 2 types of proceedings: tortious proceedings and the non-tortious proceedings.<sup>57</sup> Tortious proceedings are claimed by victims in regards to damages sustained as a result of monopoly behaviour. For example, provided that the offenders committed an illegal abusive behaviour of a dominant position, the potential claimant may sue for loss endured because of a reduced market share. Non-tortious proceedings are claimed due to the content of agreement or the regulation of the trade association, especially the direct purchasers claimed for the loss caused by the vertical agreement. The confirmation of the validity of the agreement can also be deemed as a non-tortious proceeding.

Article 2 of the Judicial Interpretation on AML confirmed that the antitrust action can be brought as stand-alone and follow-on actions. Before the legislature of the Judicial Interpretation on AML, there were disputes as to whether the stand-alone action should be allowed. Some sceptical opinion argued that the stand-alone action cannot be effective and suggested that only the follow-on action can result in an effective private action.<sup>58</sup> Hence, it is necessary to place the successful public enforcement decision as a precondition of any private action. The dispute in regards to the connection of public and private enforcement has been considered in the Solicit Opinion on Draft of the Judicial Interpretation, in which three related points have been identified: firstly, the follow-on action; secondly, the binding effect of the public authorities' decision regarding the follow-on action; thirdly, when public and private enforcement are launched at the same time, the court can decide to stay its proceeding.<sup>59</sup> In the final Judicial Interpretation, follow-on and stand-alone actions has been confirmed explicitly in Article 2.<sup>60</sup> But the binding effect and the power to stay the proceeding were cancelled, which left some legal uncertainties and lacuna.

### **bb) Jurisdiction**

The court system in China consists of the Supreme Court, the high Court, the intermediate court, the basic court and the special court.<sup>61</sup> Article 3 of the Judicial Interpretation on AML stipulates *'the first instance of the anti-monopoly civil actions should be accepted by the intermediate people's court of cities in the Independent Plan<sup>62</sup>, of capitals in provinces as well*

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<sup>57</sup> Article 1 of the Judicial Interpretation on AML

<sup>58</sup> See Pengcheng Zheng, 'The Difficulties in the Private Enforcement of AML and Its Solutions: A Perspective Analysis (《反垄断法》私人实施之难题及其克服: 一个前瞻性探讨, fanlongduan fa siren shishi zhi nanti jiqi kefu: yige qianzhan xing tantao)', *The Jurist*, 6/2010, 103

<sup>59</sup> See Responses to Reporters' Requests of the Draft for Comments of the Judicial Interpretations of the Anti-Monopoly Law from a Superintendent of Intellectual Property Tribunal of Supreme People's Court.

<sup>60</sup> Article 2 of Judicial Interpretation on AML

<sup>61</sup> The Supreme Court is the highest judicial organ in China. The competences of the Supreme are: a) tying the most important case as the first instance, hearing the appeal against the judgment or decision from the high court, trying the protested case filed by the Supreme Procuratorate; b) supervising the work of local courts and special courts and overruling the wrong judgment or decision made by them; c) releasing the judicial interpretation of law, which is enforceable by all the courts.

<sup>62</sup> The five Cities with Independent Plan with the full name of the Cities with Independent State Social and Economic Developing Plan, are Dalian, Qindao, Ningbo, Xiamen, and Shenzhen. (计划单列市 jihua danlie shi)

as autonomous regions, of municipalities and the intermediate people's court, which is designated by the Supreme People's Court.<sup>63</sup> That means, not all intermediate courts have jurisdiction over antitrust litigations. The 3<sup>rd</sup> tribunals within the intermediate courts are responsible for antitrust damages actions, which in addition also take charge of cases related to the IPRs, administrative litigation and unfair competition according to the new *Provision on the Cause of Action of Civil Cases*.<sup>64</sup> Furthermore, 'the basic people's courts were empowered by the Supreme People's Court have the jurisdiction of a court of the first instance'.<sup>65</sup>

With regard to territorial jurisdiction, generally 'the claimant should bring the action before the court where the defendant has his domicile; or the lawsuit should be brought to his habitual residence when his domicile is not his habitual residence'.<sup>66</sup> 'If the domiciles or habitual residences of several defendants in the same litigation are located in different areas, all the courts in these areas shall have jurisdiction'.<sup>67</sup> In the case of antitrust actions, 'the claim should be filed before the court in the place where the infringement has been committed or the defendant has his domicile'.<sup>68</sup> To be more specific, it concerns the place where the infringement has been committed including 'the place where the infringing conduct is carried out or where the result occurred'.<sup>69</sup> Article 5 of the Judicial Interpretation provides that the case should be transferred from the court without jurisdiction over antitrust action to the court which has jurisdiction, provided that i) the claim was not filed as an antitrust cause, but an antitrust defence or an antitrust counterclaim with the support of evidence was proposed by the defendant subsequently; or ii) the action needs to be heard under the AML.<sup>70</sup>

### cc) Joint action

Joint action is allowed pursuant to Article 6 of the Judicial Interpretation on AML where two or more claimants brought two or more claims against the same monopolistic conduct before the same court. To be specific, if they filed claims before different courts, courts subsequently seized of claims should transfer these claims within 7 days to the court which first seized of them.<sup>71</sup> In China, three types of consolidated action may be available for antitrust injured persons: joint action, representative action and public action. Joint action is governed by Article 52 of CPL, which requests that the persons can only bring joint action before the court only if two pre-conditions have been satisfied, i.e. 'two or more persons' and 'the object being same or of the same category'.<sup>72</sup>

<sup>63</sup> Article 3 subsection 1 of Judicial Interpretation on AML

<sup>64</sup> Article 16 of the Provision on the Cause of Action of Civil Case

<sup>65</sup> Article 3 para 2 of the Provision on the Cause of Action of Civil Case

<sup>66</sup> Article 21 para 1 of Civil Procedure Law

<sup>67</sup> Article 21 para 3 of Civil Procedure Law

<sup>68</sup> Article 28 of Civil Procedure Law

<sup>69</sup> No. 28 of Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (最高人民法院关于适用中华人民共和国民事诉讼法若干问题的意见, zuigao renmin fayuan guanyu shiyong zhonghua renmin gonghe guo minshi susong fa ruogan wenti de yijian), No.22 [1992] of the Supreme People's Court 14/07/1992, (partially invalid), available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=6690&CGid=>

<sup>70</sup> Article 5 of the Judicial Interpretation on AML

<sup>71</sup> Article 55 of Chinese Civil Procedure Law

<sup>72</sup> Article 52 of CPL provides that 'When one party or both parties consist of two or more than two 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.

If a party of two or more persons to a joint action have common rights and obligations with respect to the object of action and the act of any one of them is recognized by the others of the party, such an act shall be valid for all the rest of the party; if a party of two or more persons have no common rights and obligations with respect to the object of action, the act of any one of them shall not be valid for the rest.' It implies that the reason to amalgamation is that the litigants have the same or common causes or liabilities which make it possible for the court to try them in one trail.

Furthermore, concerning mass damages claims, the representative action with unidentified members has been deemed as a special type of joint action according to Article 53 of CPL.<sup>73</sup> Representative action is a mechanism with opt-in procedure in Chinese law. The representatives that are the members of the group have the legal standing as claimants (or defendants). They are selected by all registered members in the group.<sup>74</sup> The representative is allowed to act on behalf of the party he represents, except for significant issues such as modification or waiver of the claim, or admission of the claims from other parties, or agreeing on a compromise with other parties.<sup>75</sup>

Provisions in CPL preclude the representative organization action. However, the public interest action which allows the organ or foundation (authorized by law) relying on the environment, consumers and other issues related to public interest to bring an public action before the court may probably act as an alternative.<sup>76</sup> It provides a legal foundation for public interest action in China. Later, the new Consumer Protection Law was released in 2013, which provided in Article 47 that ‘China consumers’ association and consumers’ association in provinces, autonomous regions or municipalities are able to rely on the infringement of mass consumers to bring an action before national courts.’<sup>77</sup> The application of this Article still calls for future detailed provisions or interpretations. So far in the light of this Article, the standing of the consumer association is derived of by the law, not of the delegation of the consumer. It may bring an action for consumer interest independently, which may result in several problems. The first problem is whether or not the consumer association has the competence to bring an antitrust damages action on behalf of mass consumers. If the answer is affirmative, it is also not clear whether consumers have been deprived of the standing to sue, if the consumer association has brought an antitrust damages action. Another problem concerns the way in which damages could be proved, calculated and appointed without the delegation from consumers. Some academics think that the competence of the consumer association should be limited to small damages claims so as to protect the right of the person who suffered large damages.<sup>78</sup>

## **dd) Evidence and the onus of proof**

### **(1) Types of evidences**

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<sup>73</sup> Article 53 of the civil procedure law provides that ‘if the persons comprising a party to a joint action is large in number, the party may elect representatives from among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent. However, modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subject to the consent of the party they represent.’

<sup>74</sup> If the selection among members are difficult, the court shall negotiate with members about representatives; See Jianhua Xiao, ‘Comparative Study on Group Litigation and the Chinese Representative Action (群体诉讼与我国代表人诉讼的比较研究, qunti susong yu woguo daibiaoren susong de bijiao yanjiu)’, *Journal of Comparative Law* 02/1999, 238

<sup>75</sup> White Paper, 1.2

<sup>76</sup> The term ‘法律规定的机关和有关组织’ in this Article can be translated as: ‘state bodies and related organizations authorized by law’ or ‘state bodies authorized by law or organizations concerned’. It caused the confusion in this Article without the detailed interpretation of this Article by the legislator and the Supreme Court. The former opined that state bodies and related organizations should both be authorized by law so as to bring the public interest action. The latter opined that only state bodies need the authority from the law. Organizations can be awarded the standing by the certification of administrative bodies, only if they can satisfy conditions laid down by the law. The second argument has been confirmed in the judgment of the High Court in Jiangsu Province.

<sup>77</sup> Article 47 of Consumer protection law

<sup>78</sup> See Xiong Yuemin, ‘Analysis on the types of consumer mass damages action, (消费者群体性损害赔偿诉讼的类型化分析, xiaofeizhe quntixing sunhai peichang susong de leixinghua fenxi)’, *China Legal Science*, 2014/1, 209

In China, the types of evidence in civil action include: documents, real evidence (physical objects), audio-visual materials, digital data, testimony (oral or written), litigants' statement and expert opinion.<sup>79</sup> Among these, documents are the most significant evidence in a trial, which may probably contain agreements between the parties, records of conference, letters and emails, internal files of the undertaking, price lists, statistical data regarding dominance, analysis of the industry, financial statements and etc. Other documents used as corroborating evidence include documents depicting the facts of the case (such as customers lists, information on competitors, marketing reports and others), as well as the analytical evidence (such as strategy and pricing documents, business plans, evaluation reports). Another significant type of evidences is an expert testimony that has already been used in several prominent cases, such as *Qihoo v. Tencent* by the Supreme Court. It cannot be denied that the economic evidence plays a pivotal role in antitrust action, not only by defining the relevant market and dominant position or by determining the pro- or anti-competitive effect of the agreement (*'the effect on eliminating or restricting the competition'*), but also by calculating damages.<sup>80</sup> The Judicial Interpretation confirmed the expert testimony by stating that *'a party may apply to the court to have one or two experts - the person with professional knowledge - to explain specific questions in the trial.'*<sup>81</sup> Article 13 provides that the experts (professional institutions or professionals) conduct a market survey or create a report of the economic analysis on specific issues which can also be applied by the litigants in the trial.<sup>82</sup> On the probative value of the market survey or a report of the economic analysis, the court has the competence to examine and estimate the provided evidence according to CPL and the relevant judicial interpretation in its judgment.<sup>83</sup>

## (2) Binding effect of the final decision from the competition authorities and courts

As regards the direct binding effect of the final decision from the competition authorities NDRC and SAIC, a lacuna and uncertainty certainly exist in China. First of all, the final decision here implies the decision which has already come into effect and is not appealable. In the light of judicial independence (subsection 2 of Article 6 of CPL), the court should act independently and make their own adjudication, which should not be bound by any decision of government, social organization or individual. Neither AML nor Judicial Interpretation issued a special rule on the binding effect of the decision from the competition authorities. Furthermore, the authorities' decision which has not been confirmed through the judicial procedure cannot be deemed as reliable evidence in the action. But one possible exception that has been indicated in the literature is that the decision from an administrative action on the validity of the final decision issued by competition authorities may have the binding effect on the concurrent or subsequent civil antitrust action.<sup>84</sup> Article 9 of the Judicial Interpretation on Evidence provides that the litigants do not need to prove the fact that has been confirmed by a final decision of the court.<sup>85</sup> Re-litigation on the same facts (usually the facts on infringement) should be prevented due to the cost of the litigation and the coherent application of the law by different courts. But the onus of proof on other facts such as causation and damages should still rest with the parties in the civil action.

<sup>79</sup> Article 63 of CPL

<sup>80</sup> The significant application of the economic evidence in Chinese court has been excessively discussed in: see Fang Qi, Marshall Yan, Yan Luo, Consideration of Economic Evidence by Chinese Courts in Antitrust Litigation, *CPI Antitrust Chronicle*, Feb 2014 (1)

<sup>81</sup> Article 12 of the Judicial Interpretation on AML

<sup>82</sup> Subsection 1 sentence 2 of Article 13 of the Judicial Interpretation on AML also provides that in regards to the selection of the experts the litigants can negotiate with each other. If they fail to reach a consensus, the court shall appoint one for them.

<sup>83</sup> Subsection 2 of Article 13 of the Judicial Interpretation on AML

<sup>84</sup> Zhao Dong, Research on Civil Anti-Monopoly Evidence System (反垄断民事证据制度研究 fanlongduan minshi zhengju zhidu yanjiu) (China University of Political Science and Law Press 2014), 146-147

<sup>85</sup> Article 9 of Judicial Interpretation on Evidence

The lack of rules governing the direct binding effect of the final decision does not imply that it is a non-controversial issue in Chinese law. The discussions of controversies can be found in the preparatory work of the present Judicial Interpretation on AML. The Chinese Supreme Court proposed the relevant rules in the Solicit Opinion on Draft of the Judicial Interpretation on AML (Articles 11 and 15). They provided that

*Article 11 The facts that have been confirmed by the valid decision from the People's Court, if the litigants held the facts in the related antitrust private action, do not need to be proven, unless the rival parties have the opposite evidence to rebut it.*

*The facts that have been confirmed by the final decisions on the monopolistic behaviour from the competition authorities shall refer to the foregoing paragraph.*

*Where the competition authorities decided to suspend the investigation relying on the commitment made by the undertaking, this commitment of the undertaking shall not be used to infer the existence of the monopolistic behaviour directly.*

*Article 15 Provided the alleged monopolistic behaviour has been investigated by the competition authorities but has not been found illegal, the People's Court shall review the claims of the litigants comprehensively and make the final decision.*

However, regrettably, these rules cannot be found in the final version of the Judicial Interpretation on AML. Although they have been cancelled, they still offer some insightful points for the discussion. On the one hand, Article 11(2) provides a rebuttable presumption on the fact that was affirmed in the final decision, virtually affirming the probative value of the final decision to a certain degree. It is difficult for the defendant to rebut the final decision of the competition authorities because the final decision implies that the opportunity to appeal has been exhausted or has expired. On the other hand, Articles 11(3) and 15 answer the probative effect of two special cases: the commitment decision and the non-infringement decision made by the public authorities. Neither of them should generate any impact on civil action and impair the person's right to sue. The following Article 16 of the Solicit Opinion on Draft of the Judicial Interpretation on AML rules that the court may or may not decide to stay the proceeding, when the alleged behaviour has been investigated by the competition authorities, (which were apparently based on the consideration of the coherent application of the AML).<sup>86</sup>

In the literature, the opposing opinions are normally based on the principle of judicial independence.<sup>87</sup> The opinions favouring the binding effect are usually concerned with litigation cost, the efficiency of the procedure and the coherent application of AML.<sup>88</sup> There are even scholars indicated that the public enforcement should be place as a prerequisite of the civil action, i.e. forbidding the stand-alone action, so as to promote the efficiency of the procedure.<sup>89</sup> This opinion has not been adopted by the Supreme Court in the final Judicial Interpretation, which in contrast explicitly confirmed the existence of the follow-on as well as stand-alone action.<sup>90</sup>

### **(3) No disclosure rule**

Generally speaking, there is no disclosure tradition in Chinese civil procedural system. The alternative route for litigants is prescribed by Subsection 2 of Article 64 of CPL, which provides that *'if parties and their attorneys cannot gather evidence for the objective reasons, or the court*

<sup>86</sup> Article 16 of the draft Judicial Interpretation on AML

<sup>87</sup> Dong Zhao, *supra* n 84, 146

<sup>88</sup> Zongzan Wan, The New Study on the Antitrust Private Action System (反垄断私人诉讼制度创新研究, fanlongduan siren zhidu chuangxin yanjiu) (Xiamen University Press 2012), 197-198; Ruiping Zhang, Study on Safeguarding the Right to Sue in Antitrust Law (反垄断诉权保障机制研究, fanlongduan suquan baozhang jizhi yanjiu) (Lixin Accounting Publishing House 2013), 155

<sup>89</sup> See Pengcheng Zheng, *supra* n 58, 98-105

<sup>90</sup> Article 2 of the Judicial Interpretation on AML

*opines the requisite evidence for the litigation, the court should inspect and gather the evidence*'. Articles 15 to 22 of the Judicial Interpretation on Evidence provide a detailed explanation of this Article. Article 15 of the Judicial Interpretation on Evidence explains the circumstances for *'the requisite evidence for the litigation (that the court opined)'* as two types, i.e. evidence *'likely referring to the nation's interest, public interest or legitimate interest of a third party'*; as well as evidence *'referring to supplement litigants, suspend action, terminate action, referred to rule of avoidance and other pure procedural issues'*.<sup>91</sup> The court is able to inspect and gather these types of evidence proactively on its discretion (Article 16 of Judicial Interpretation on Evidence), which implies that it does not request the related claims (or applications) from the parties. In addition, litigants and their attorneys can apply to the court to inspect and gather the evidence, including: (i) evidence *'referring to documents and materials preserved by the state body and must be procured by the court pursuant to its competence'*; (ii) evidence *'referring to materials of the national secrecy, the business secrecy or individual privacy'*; (iii) evidence that *'cannot be gathered solely by litigants or their representatives for the objective reasons'*.<sup>92</sup> The request to the court to gather the evidence must be submitted in written form with basic information on the party that holds the evidence, the content of the evidence, the reason for the request and the facts in need of proving by the requested evidence.<sup>93</sup> The request should be filed no later than 7 days before the deadline of evidence production (that is usually set by the court).<sup>94</sup>

If the court refuses the application brought by the litigants, it must inform the litigants and their attorneys, which offers the litigants an opportunity to apply for reconsideration.<sup>95</sup> Articles 20, 21 and 22 of the Judicial Interpretation on Evidence provide the types of the evidence that can be inspected and gathered by the court, including the documents, physical objects, audio-visual materials, digital data and their copies.<sup>96</sup> Basically, the court is not bound by the decision of the public competition authorities, while the court also has no power to procure the evidence or material held by the competition authorities.

#### **(4) Rebuttable presumptions on the dominant position**

Apart from the fact already confirmed by the final decision of another or the same court, the Judicial Interpretation on AML also established two types of rebuttable presumptions in regards to the fact of dominance, which are prescribed in Articles 9 and 10 in order to facilitate the establishment of the dominant position of the defendant by the claimant.<sup>97</sup> Article 9 lightens the burden of proof on the claimant concerning dominance of public utility and other undertakings with the similar market power granted by the law or other regulations. It provides a rebuttable presumption on dominance of public utility or other similar undertakings. Article 10 establishes a rebuttable presumption concerning the fact of dominance by the information released publicly by the defendant itself (the so-called 'self-promotion', such as advertisement on its website). These two Articles explicitly lighten the burden of proof on the claimant and complexity of the action claimed for loss due to a breach of abuse of dominance.

#### **(5) Onus of proof**

<sup>91</sup> Article 15 of the Judicial Interpretation on Evidence

<sup>92</sup> Articles 16, 17 of the Judicial Interpretation on Evidence; Article 94 of the Judicial Interpretation on CPL (2015)

<sup>93</sup> Article 18 of the Judicial Interpretation on Evidence

<sup>94</sup> Subsection 1 of Article 19 of the Judicial Interpretation on Evidence

<sup>95</sup> Article 19 of the Judicial Interpretation on Evidence

<sup>96</sup> Articles 20, 21 and 22 of the Judicial Interpretation on Evidence

<sup>97</sup> Article 9 of Judicial Interpretation on AML

According to the Judicial Interpretation and experience drawn from settled cases, three basic factors should be proven in an antitrust tortious action in China: the infringement, the damages and the causation between them. Generally, the antitrust offenders are rational undertakings that committed a violation with intention. It is difficult to image a situation wherein the undertaking is committed to a cartel or a predation without realizing it. There is probably no need for the claimant to show the evidence or facts when proving the fault of the defendant in the action. But another related question needing more attention is that concerning the issue whether the defendant initiated the cartel proactively and acted as a leader, or whether the defendant has been forced to participate in the cartel. In addition, if it is a contractual proceeding, the invalidity of the agreement or the regulation of the trade association and the damages or restitutions should be established by the claimant.

The basic rule of the burden of proof is the one that makes an allegation in need of proving under Article 64 of CPL.<sup>98</sup> Accordingly, Article 8 of the Judicial Interpretation on AML provides that *'the claimant should bear the burden of proof on the defendant's dominant position and the abusive behaviour'*, whereas *'the defendant shall bear the burden of proof on a defence asserting that there is a valid justification for the behaviour'*.<sup>99</sup> As introduced above, the rebuttable presumption as to proving the dominant position takes two special circumstances into account—public utilities and self-promotion, as established in Articles 9 and 10 of the Judicial Interpretation.

In consideration of the horizontal agreement, Article 13 of AML governs the prohibition of the horizontal agreement.<sup>100</sup> Literally, there is not a *per se* illegal on the hard-core cartel in China. The Judicial Interpretation on AML established a shifting burden of proof regarding the infringement of the horizontal agreement, which can be deemed to create an amendment to the lack of a *per se* illegal rule. According to Article 7 of the Judicial Interpretation on AML, the defendant should firstly undertake the onus of proof as to the effect of the agreement (that falls within Article 13 Subsection 1 No. (1) to (5)) not eliminating or restricting the competition.<sup>101</sup> In case of failure, he would bear the adverse legal consequence. As regards the vertical agreement, the claimant should prove that the agreement alleged to be illegal has indeed *'the restrictive or eliminative effect on competition'*.<sup>102</sup> Furthermore, a possible exemption of the agreement through Article 15 of AML should be rest with the defendant for both the horizontal and vertical agreement.

In addition, the protection of the confidential information in the litigation is important. The Provision stipulated that when the evidence related to the national secret, commercial secret or the individual's privacy, or the content which should be protected according to the law, the court (1) shall hear the case *in camera*; (2) shall lay down the restriction or prohibition regarding the copy of documents, (3) shall order to disclose the relevant evidence only to lawyers, (4) should order the parties to sign the confidentiality clause.<sup>103</sup> These measures are adopted by the court on its own motion or following the application by the litigants. These rules can also be found in the *Juridical Interpretation on the Chinese Procedure Law issued by Supreme Court*.<sup>104</sup>

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<sup>98</sup> Article 64 of CPL; in addition, Article 1 of the Judicial Interpretation on Evidence provides that *'the claimant filed a claim or the defendant propose a counterclaim before court, which should satisfy the evidence standard in filing an action'*. Article 2 provides that *'the parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted. Where any party cannot produce evidence or the evidences produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavorable consequences.'*

<sup>99</sup> Article 8 of the Judicial Interpretation on AML

<sup>100</sup> Article 13 of AML

<sup>101</sup> Article 7 of Judicial Interpretation on AML

<sup>102</sup> In the case Beijing Ruibang Yonghe Science and Technology Trade Company ('Rainbow') v Johnson & Johnson (available at [http://www.pkulaw.net/fulltext\\_form.aspx?Gid=119574868&Db=pcas](http://www.pkulaw.net/fulltext_form.aspx?Gid=119574868&Db=pcas)), the claimant 'Rainbow' did not successfully prove 'the restrictive or eliminative effect' of the vertical agreement.

<sup>103</sup> Article 11 of Judicial Interpretation on AML

<sup>104</sup> Article 103 of the Judicial Interpretation on CPL

### ee) Civil liabilities and limitation periods

Basic types of the civil liabilities in China include: (1) cessation of infringement, (2) removal of obstacles, (3) elimination of dangers, (4) return of property, (5) restoration of the original condition, (6) repair, reworking or replacement, (7) compensation for loss, (8) payment of breach of contract damages, (9) elimination of ill effects and rehabilitation of reputation, (10) the apology.<sup>105</sup> The civil liabilities include tortious liabilities and contractual liabilities.<sup>106</sup> The underlying injured person may under normal circumstances file a claim for the cessation of infringement and compensation for loss in an antitrust action. As regards the agreement or the regulation of the trade association, the injured person can claim the invalidity of the agreement or regulation under Article 15.<sup>107</sup> Compensation claimed by victims includes loss and reasonable costs according to Article 14 of the Judicial Interpretation on AML.<sup>108</sup> The reasonable costs include the money spent on the investigation and the prevention of the monopolistic conduct.<sup>109</sup> First of all, the conception of the loss is not made clear by the Law. Generally, there is no doubt that the actual loss should be deemed as a part of the loss. There are controversies regarding the loss of profit due to a reduction in sales. Pursuant to the Judicial Interpretation on AML, it seems that the claimant would be awarded the full compensation. One example is the case *Rainbow vs. Johnson & Johnson*, in which the court of the second instance granted the claimant Rainbow lost profit.

The limitation period for the compensation claim due to the breach of AML starts with '*the date that the claimant knows or should have known of the infringement of its rights and interests by the monopolistic conduct*'.<sup>110</sup> The period is interrupted if the claimant complains to the competition authorities. It may have two possible results: i) the competition authorities reject the complaint, revoke the acceptance of the case or terminate the investigation. The period should be re-calculated from the date on which the claimant knew or should have known the decision of the competition authorities. ii) The competition authorities found the conduct or agreement violated AML through the investigation.<sup>111</sup> The period is re-calculated from the date on which the claimant knew or should have known the valid final decision of the competition authorities on the violation, such as the decision as to any sanction.<sup>112</sup> Another problem is damage calculation concerning the continuous of the effect of the conduct or agreement in most antitrust cases. Article 16 provides that '*if the alleged monopolistic behaviour has continued for more than two years before the claimant filed an action with the court, the amount of compensation for damages shall be calculated to cover the two years prior to the date when the plaintiff filed the action before the court*'.<sup>113</sup>

### III. Analysis of the right to sue in Chinese antitrust damages action

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<sup>105</sup> Article 134 of General Principle of Civil Law; Article 14 of the Judicial Interpretation on AML

<sup>106</sup> Article 106 of the General Principle of the Civil Law

<sup>107</sup> Article 15 of the Juridical Interpretation on AML

<sup>108</sup> Subsection 1 of Article 14 of the Juridical Interpretation on AML

<sup>109</sup> Subsection 2 of Article 14 of the Juridical Interpretation on AML

<sup>110</sup> Subsection 1 of Article 16 of the Juridical Interpretation on AML

<sup>111</sup> Subsection 2 of Article 16 of the Juridical Interpretation on AML

<sup>112</sup> Subsection 2 of Article 16 of the Juridical Interpretation on AML

<sup>113</sup> Subsection 3 of Article 16 of the Juridical Interpretation on AML

## 1. Rules governing the standing of claimants

### a. The foremost rule: the ‘direct interest’ standard in Article 119 of CPL

Generally, a civil litigant has been defined in many literatures as ‘a person relying on a dispute of the civil right or liability in his own name, brings a claim before a court, having a direct or legal interest in the result of the trial and being bound by the adjudication’.<sup>114</sup> Two premises can be concluded in the light of this definition: 1) the claim is brought in one’s own name; 2) the person should have a direct interest (proximate cause) in the claim. The direct interest standard is the main standard for awarding the standing to a person according to Article 119 of CPL. Article 119 of CPL provided that ‘the following conditions must be met when a lawsuit is brought: (1) the claimant must be a natural person, a legal person or any other organization that has a direct interest in the case; (2) there must be a definite defendant; (3) there must be a specific claim or claims, facts, and cause or causes for the suit; and (4) the suit must be within the scope of acceptance for civil actions by the people’s courts and under the jurisdiction of the people’s court where the suit is entertained’.<sup>115</sup>

‘Direct interest’ can probably be determined where a person suffered loss directly due to the infringement, or where a person has a direct interest in the subject-matter or the event causing injury, or when a person has the entitlement to protect another certain right according to the law.<sup>116</sup> The former type is that of a person bringing a claim before the court pursuing his own interest. The latter can be deemed an extension of the ‘direct interest’ rule. The direct interest can be identified according to the provision of the law which awards the person with the right to protect, manage or dispose of another right that has been infringed.<sup>117</sup>

### b. Article 1 of the Judicial Interpretation on AML governing the standing to sue

Article 1 of the Judicial Interpretation on AML provides that

*‘under this Interpretation, the civil action due to the monopoly behaviour (hereinafter referred as to antitrust civil action) denotes that natural or legal persons, or other organizations who rely on the damage due to monopoly behaviour or the dispute of a breach of AML (such as the content of contract or the regulation of trade association) can file a civil claim before the People’s Court.’*<sup>118</sup>

In the light of this Article, the potential claimant could be any natural or legal person or organization. The pre-conditions for them to bring an antitrust action are: 1) they suffered harm due to the monopoly behaviour; or 2) they are parties in an antitrust dispute. It should be noted

<sup>114</sup> Wei Jiang ed., Chinese Civil Procedural Law, (中国民事诉讼法教程, zhongguo minshi susong fa jiaocheng) (China Remin University Press, 1990), 116; Rongxin Yang ed., Civil Procedural Law, (民事诉讼法教程, minshi susong fa jiaocheng) (China University of Political Science and Law Press, 1986), 112.

<sup>115</sup> The latest amendment was in 2012. Article 48 of the new amendment of CPL; According to No. 40 of the judicial interpretation of General Principle of Civil Law, ‘other organizations are organizations which are formed lawfully and possess a certain institutional framework as well as asset, but which do not qualify as a legal person.’

<sup>116</sup> Yi Chang ed., Civil Procedural Law, (民事诉讼法学, minshi susong faxue) (China University of Political Science and Law Press, 2005), 285.

<sup>117</sup> The examples are the liquidator in bankruptcy law, executor in succession law, etc; See Li Long, ‘A Tentative Research on the Justification of Parties in Civil Proceedings, (民事诉讼当事人适格刍论, minshi susong dangshi ren chulun)’, *Modern Law Science*, 8/2000, 77-78.

<sup>118</sup> Article 1 of the Judicial Interpretation on AML

that in the application of provisions as to the question who has the standing to sue, Article 1 of the Judicial Interpretation must be consistent with the Article 119 of CPL. In other words, the ‘direct interest’ is definitely the main standard in an antitrust action.<sup>119</sup> The Supreme Court attempted to create a seemingly relatively broad definition of the standing to sue in an antitrust action and intended to encourage most of the injured persons to sue. But it also causes some uncertain and unclear questions concerning the standing of indirect purchasers or new entrants as to whether they can satisfy the standard of ‘direct interest’, which needs further interpretation or response regarding these issues in the future.

## **2. Analysis of the right to sue concerning various potential injured persons**

The number of potential victims may be large, which may probably consist of suppliers, buyers, competitors, new entrants, producers of complementary products or others. Customers of the people mentioned above are also potential victims, because damages which resulted from a collision or abusive behaviour are possible to be passed on to upstream or downstream in the distribution chain. However, it cannot be denied that they find it difficult to prove the loss they suffered. In this section, the standing of buyers, competitors and new entrants will be discussed.

### **a. Direct purchasers and indirect purchasers**

The standing of direct purchasers has so far been confirmed in several cases, such as the cases *Beijing Ruibang Yonghe Science and Technology Trade Company (Rainbow) v. Johnson & Johnson (vertical agreement, standing of co-contractor)*, *Feng Yongmin v Fujian Provincial Expressway Company Ltd*, *Wu Xiaoqin v. Shanxi Broadcast & TV Network Intermediary Group Co., Ltd*.

#### **aa) Direct purchasers**

##### **(1) Standing of co-contractors**

The argument as to whether the co-contractor relying on their illegal agreement has the right to bring an antitrust claim before the court has been discussed in the case *Beijing Ruibang Yonghe Science and Technology Trade Company* (‘Rainbow’) *v Johnson & Johnson* (hereafter case Rainbow).<sup>120</sup> As the claimant and appellant in this case the firm Rainbow was one of the distributors of Johnson & Johnson in the market of medical apparatuses and instruments in Beijing. Johnson & Johnson concluded a distribution agreement with Rainbow which included the provisions of the resale price maintenance (RPM) on the surgical stapling and the sutures.

The defendant Johnson & Johnson contended that Rainbow as a party of the agreement had no standing for bringing the action. The Shanghai High Court as the court of appeal affirmed the standing of the co-contractors by indicating three reasons. Firstly, the co-contractors could also be the injured persons because of the agreement. Rainbow, the co-contractor in this case may lose some customers and profits due to the application of the RPM. Hence they should be awarded with the standing to sue, otherwise their relief cannot be guaranteed. Secondly, it is

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<sup>119</sup> Zhang Ruiping, *supra* n 88, 75-76.

<sup>120</sup> See case Rainbow, *supra* n 102

likely that the co-contractors have been forced to commit to RPM, especially when they have a relatively weak bargaining power in the market. Accordingly, the standing of the co-contractor falls within Article 1 of the Judicial Interpretation on AML. Thirdly, allowing the co-contractors the right to sue is consistent with the objectives of antitrust action, i.e. preventing the monopolistic conduct, improving the competition, protecting consumer and public interest. It is also helpful for the discovery of the illegally concealed agreement.

## **(2) Onus of proof**

Firstly, the injured person claiming the agreement that violated the AML should prove that the agreement falls within Articles 13 or 14 as to the horizontal or vertical agreement. The defendant should show evidence that the agreement cannot fall within Articles 13 or 14, or even if it does, it can satisfy the condition on exemption laid down in Article 15. If it is a horizontal agreement, Article 7 of the Judicial Interpretation on AML provides a shifting burden of proof which requests the defendant to prove that the agreement does not have '*the effect of eliminating or restricting of competition*'.

If it is a vertical agreement, the claimant needs to prove the pro-competitive or anti-competitive effect of the agreement in the relevant market. It may probably need the analysis of the underlying economic effect of the agreement. In *Rainbow*, for example, four questions were proposed for the analysis as to whether the RPM in this case has '*the effect of eliminating or restricting the competition*': i) whether the competition in the relevant market is sufficient; ii) whether the position of the defendant in the relevant market is dominant or strong; iii) what are the motives of this RPM agreement; iv) the pro- or anti-competitive effect of the RPM.

## **bb) Indirect purchasers**

In respect of the question as to whether indirect purchasers have the standing to sue in an antitrust action in China, the clear expression cannot be found in the AML. As discussed above, Article 50 of AML did not explicitly indicate the answer to the question as to 'who has the right to sue'. The legislator used the term 'civil liability' to confirm that the private enforcement can become an alternative in the entire enforcement system and left the loophole regarding the question about the standing to sue. It followed that the judicial interpretation by the Supreme Court did not deny the standing of the indirect purchaser to sue, although it also did not explicitly affirm it.

In the the Solicit Opinion on Draft of the Judicial Interpretation on AML, subsection 1 of Article 4 was expressed as '*the natural, legal person or the other organizations, including undertakings and **consumers**, who suffered damages due to monopoly behaviour, can rely on Article 50 of AML to bring a civil action before the People's Court.*'<sup>121</sup> Subsection 2 stated '*if the claim of the claimant can satisfy conditions in Article 108 of CPL (now Article 119 of the new CPL), the court shall entertain the claim.*'<sup>122</sup> This Article specially enumerated '**consumers**' as one of the underlying eligible claimants without distinguishing between direct and indirect purchasers. The 'consumers' shall contain both direct and indirect purchasers.

This was the only time that the Supreme Court explicitly addressed the issue of indirect purchasers is in the *Speech of the press conference about the Solicit Opinion on Draft of the Judicial Interpretation*, which was given as the preparatory work for the Solicit Opinion on

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<sup>121</sup> The Solicit Opinion on Draft of the Judicial Interpretation of AML.

<sup>122</sup> *Ibid.*

Draft of the Judicial Interpretation on AML.<sup>123</sup> The Supreme Court stated several grounds that ‘*all the victims can be the claimant, including undertakings and consumers*’.<sup>124</sup> Firstly, the Supreme Court expressed that when thinking about the design of the provisions of the standing to sue in antitrust actions, the goals of the competition policy of a nation should be considered.<sup>125</sup> The protection of the consumer interest is one of the major goals of AML. Secondly, according to Article 50 of AML, the Supreme Court indicated that anyone who directly or indirectly suffered damages should have the right to sue in theory.<sup>126</sup> Some of indirect purchasers are vulnerable end users and victims who cannot pass their damages on to the next level of the distribution chain. On one hand, the Supreme Court recognizes that it is beneficial for the complementary and compensatory effect if the indirect purchasers especially final consumers have the standing as claimants in an antitrust action. On the other hand, the indirect purchasers can obtain the right to sue which was also adopted by the EU and has been deemed as a new trend when considering the whole issue. However, the term ‘*including undertakings and consumers*’ cannot be found in the final Judicial Interpretation on AML, which revealed that the standing of the consumer in Chinese antitrust action is far from a less controversial problem.<sup>127</sup> The doubts of the legislator (China Congress) and the Supreme Court regarding the question whether the Chinese judicial system is ready for private antitrust action, especially the ability to deal with the indirect purchasers issue, was also revealed.

Another question is whether or not the ‘direct interest’ standard will deny the indirect purchasers from bringing an antitrust action before the court. According to the settled cases so far, the standing of direct purchasers has already been confirmed by the courts of different provinces. Cases about indirect purchasers can hardly be found thus far. In the literature under a broad interpretation of the ‘direct interest’ standard, they may only have the standing only if they can indicate that they are the person that is factually or legally connected with the claim, or the injured interest alleged by the person can be regulated according to AML.<sup>128</sup> However, it is not clear so far in practice whether this broad interpretation would be adopted by the court in an antitrust action which is brought by indirect purchasers.

The concurrence of approval and disapproval opinions on the standing of indirect purchasers can be found in the literature. The supporter opined that the standing of indirect purchasers to sue should be allowed because there was no denial of it under Article 50 of AML and Article 1 of the Judicial Interpretation on AML. The indirect purchaser should be awarded the right to sue if they actually suffered damage as a result of a breach of provisions of AML.<sup>129</sup>

On the other hand, the opponents are of the opinion that courts in China do not have the ability to deal with the passing-on overcharges which is deemed to be a complicated problem not only for Chinese courts, but also for US’ and EU’s courts.<sup>130</sup> There is no doubt that if the indirect purchaser can bring an action, the court should deal with problems as to how to prove and calculate the passing-on overcharges. The lack of readiness in Chinese courts regarding this issue has to date been doubted.

<sup>123</sup> The officer of the Intellectual Property Tribunal of the Supreme Court answer the reporter’s questions about the draft of the judicial interpretation of AML (最高人民法院知识产权庭负责人就《垄断司法解释》答记者问, *zuigao renmin fayuan zhishi chanquan tin fuzeren jiu longduan sifa jieshi da jizhe wen*), People’s Court Daily, 2011,02, <http://www.chinacourt.org/Article/detail/2011/04/id/448570.shtml>

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> See *supra* n 123.

<sup>128</sup> See Zongzan Wan, ‘The extension of the standing of claimants in private antitrust action-based on the experiences from foreign countries, (论反垄断私人诉讼中原告资格的扩张-基于域外经验的法律借鉴, lun fanlongduan siren susong zhong yuangao zige de kuozhang- jiyu yuwai jingyan de falv jiejian)’, *Southeast Academic Reserch*, 2013/1, 171-173.

<sup>129</sup> Jifeng Liu, *The Analysis on Antitrust Cases*, (反垄断案例评析, fanlongduan anli pingxi) (University of International Business and Economics Press, 2012), 206;

<sup>130</sup> Zhang Ruiping, *supra* n 88, 81-82.

## **b. Competitors and new entrants**

### **aa) Overview**

There are few controversies on the issue of the standing of competitors in Chinese antitrust damages actions. Competitors are rival undertakings that provide the same or similar products or service as infringers in the relevant product and geographical market. The number and size of competitors play an important role in defining the efficiency of markets. Competitors that are usually in a good position to detect the infringement and collect the evidence have will normally have a more extensive intention and incentives to bring the action. The standing of the competitors plays a pivotal role in antitrust actions, especially in claiming loss due to the abuse of the dominant position. In China, a large number of antitrust claims are based on the abuse of the dominant position and are brought by competitors in the same industry, such as *Qihoo v. Tencent*, *Renren v. Baidu*, *Beijing Sursen v. Shanda Network*. The industrial sectors cover a large range of fields, including the Internet, software, telecommunication, banking, insurance, lock removal service, termite protection service and motor vehicle parts. According to the results of these cases, it is evident that most of claimants failed to prove the dominant position of the defendant. In virtually only a small number of simple cases, the claimant has succeeded in determining the defendant's dominance. The detailed difficulties will be discussed below.

The new entrants are the potential competitors for the offenders. As regards the standing of new entrants, it should be noted that although new entrants can obtain the standing to sue according to Article 119 of CPL, it is difficult for them to prove the existence of damages. The case *Huzhou Yiting Termite Prevention Services Co., Ltd. v. Institute of Termite Prevention Co., Ltd. of Huzhou City* might be a good example. In this case, the defendant was an undertaking that possessed the dominant position in the market of a terminate prevention service in Huzhou (a city in China). The claimant as a new entrant claimed that the termite prevention market in Huzhou was not an absolutely open market for new entrants because the defendant abused his dominance to set up entry barriers in the market. The court recognized that the defendant possessed the dominant position in the market of termite prevention in Huzhou. However, the court of the second instance dismissed the appeal by Yiting Co. Ltd. for the specific reasons that he was not able to prove the illegality of defendant's behaviour and the damages resulting from this behaviour.

### **bb) Infringement**

There are basically three steps for an injured person to prove infringement: i) define the relevant market; ii) establish the defendant's dominant position in the relevant market; iii) prove the defendant committed the abusive behaviour.

#### **(1) Relevant market**

First of all, *the Guide on Relevant Market* indicates the significance for defining the relevant market in the enforcement of AML, namely not only for prohibiting the abuse of dominance, but also for assessing the monopoly agreement and merger. The courts also applied this *Guide*

to define the relevant market in many private cases. Here the discussion will focus on defining the relevant market for proving the abuse of dominance by the private parties.

The relevant market is defined in subsection 2 of Article 17 as ‘a geography and product market, in which undertakings compete with each other to provide a certain commodity or service in a certain period of time.’<sup>131</sup> Apart from the product and the geography market, the factors in connection with the characteristics of the product such as the time scale, IPRs and innovation should also be taken into account.<sup>132</sup> On the delineation of the relevant market, *the Guide on the Relevant Market* provides two basic methods: the substitutability analysis and the hypothetical monopolist test (HMT).<sup>133</sup> According to Article 7 of *the Guide on the Relevant Market*, the demand-side substitutability analysis is the major benchmark for the delineation of the relevant market. The supply-side substitutability analysis can be used as a complement.<sup>134</sup> The HMT can be applied where the boundary of the market is not clear or definite.<sup>135</sup> The choice of the methods depends on the situation of the case, data and economic analysis. Articles 10 and 11 introduce the SSNIP (*small but significant and non-transitory increase in price*) as the major method of HMT.<sup>136</sup> Both have already been applied in settled cases.

### aaa) *Rainbow*

In the aforementioned case *Rainbow*, the delineation of the relevant market for sutures was one of the major disputes. Shanghai High Court used the demand-side and supply-side substitutability analysis and indicated that if the substitutability analysis is sufficiently suited the relevant market to be defined, there was no need to apply the SSNIP.<sup>137</sup> On the demand-side (as the major indicator), there was no other medical product as a substitute for sutures in surgery. Claimant *Rainbow* opined the relevant market should be defined as ‘the absorbable suture’ by submitting the documents from China Administration of Food and Drug (CAFD) to show the distinctions between absorbable and non-absorbable suture on charge and effects (because non-absorbable sutures require the surgeon to operatively remove the suture).<sup>138</sup> The Court believed that the distinctions could not eliminate the substitutability between them and the non-absorbable type could be used as a substitute product.<sup>139</sup> On the supply-side, *the Guide on Relevant Market* provides that the supply-side substitution should be taken into account when it is capable of affecting the competition which is akin to the demand-side.<sup>140</sup> The Court opined the supply-side was not relevant in this case because other undertakings could not enter into the suture market due to the industrial entry barrier.<sup>141</sup> The geography market was defined as the Mainland China market because of the access restriction regarding the production and the marketing of the medical instrument.<sup>142</sup> Therefore, the relevant market is defined as the suture market of mainland China, including the absorbable and non-absorbable sutures.

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<sup>131</sup> Subsection 2 of Article 12 of AML

<sup>132</sup> For example, the seasonal foods, the product related to the High-tech trade, the licence agreement.

<sup>133</sup> Articles 7 of the Guide on the Relevant Market

<sup>134</sup> Articles 7 of the Guide on the Relevant Market

<sup>135</sup> Articles 7 of the Guide on the Relevant Market

<sup>136</sup> Articles 10 and 11 of the Guide on the Relevant Market; the rationale of SSNIP is to increase the small but significantly (5%-10%) and non-transitorily (one year) price of product of the alleged monopolist and to see whether the customers turn to the other substitutes (and therefore to make the other substitute profitable). If they turned, these substitutes can be added into the same relevant market.

<sup>137</sup> See case *Rainbow*, *supra* n 102, 29-30.

<sup>138</sup> *Ibid*, 10

<sup>139</sup> *Ibid*, 29

<sup>140</sup> *Ibid*, 29

<sup>141</sup> *Ibid*, 29

<sup>142</sup> *Ibid*, 29

### bbb) *Qihoo v Tencent*

The Claimant Qihoo is an anti-virus software company, which contended that the defendants including Tencent, which is an instant messaging software (IM) company, abused their dominant position to force their users to uninstall Qihoo's software. The case was brought before Guangdong High Court as the first instance and was appealed before the Supreme Court as the second instance. The claims of Qihoo were dismissed by Guangdong High Court as it has incorrectly delineated the relevant market and could not show sufficient evidence regarding the dominant position.<sup>143</sup> The Supreme Court upheld the decision of Guangdong High Court and made a comprehensive analysis regarding the delineation of the relevant market, including the demand-side, supply-side substitutability analysis and SSNIP.<sup>144</sup> In its judgment, Guangdong High Court did not provide a definite scope of the relevant market, but merely analysed the underlying substitutes in the IM market by means of substitutability analysis and SSNIP. The Court defined the free service as a key characteristic of the IM product and the possible revenue of the IM company coming from advertisement and other added-value service. There are few controversies regarding the definition of the three types of IM products: multifunctional IM (as QQ, MSN), cross-platform IM (as Fetion in China) and cross-network IM (as Skype). The Court further analysed the substitutability of the text, voice, video call, the social networking (such as SNS social Networking or Weibo), the traditional telecom service (such as phone, fax) and email. The Court only excluded the traditional telecom service and email from the relevant market. But the Court also indicated that the reason for an anti-virus company (Qihoo) to sue against an IM company (Tencent) was due to the nature of the competition in internet market, which was the competition regarding the value-added service and advertisement rather than on the IM service without a charge. On the geography market, the claimant opined that it was the mainland China market, whereas the defendant argued it was the global market. The Court affirmed the defendant's opinion and defined it as the global market.

The claimant contended in the appeal that the judgment of the Guangdong High Court as the court of the first instance did not provide a definite delineation of the relevant market. The Supreme Court answered by indicating that not all abuse cases needed a definite delineation of the relevant market. Whether or not the relevant market is able to be defined in a case depends on the circumstance of the case, such as available evidences, data and the complexity of the competition. Even though the delineation of the relevant market is indefinite, the court can make an estimation on the market position and potential influence of the alleged conduct according to '*the direct evidence for eliminating or hindering the competition*'.<sup>145</sup> But under some circumstances, an absolute delineation of the relevant market is extremely difficult. Apart from these, the Supreme Court adopted the SSNDQ test under the consideration that the price is not an appropriate indicator in the free-charge IM software market.

From the abovementioned two cases, it can be determined that the demand-side substitutability is the major method for the delineation of the relevant market. Regarding the question as to whether the court will further adopt methods such as supply substitutability analysis or SSNIP, it usually depends on whether litigants showed the related evidence or economic analysis concerning these methods and whether these methods are applicable.

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<sup>143</sup> *Qihoo v. Tencent* [2013], Guangdong High Court [2013] ([2013] No.2 ((2011)粤高法民三初字第2号), 20 March 2013, available at [http://www.pkulaw.cn/case/pfnl\\_118777709.html](http://www.pkulaw.cn/case/pfnl_118777709.html) ; *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, Supreme People's Court ([2013] No. 4 ((2013) 民三终字第4号), 8 October 2014, Wang, Li, et al. (ed) – Chinese Competition Decision Summaries, Case data: October 2014, available at: [http://www.court.gov.cn/zgcpwsw/zgrmfy/zscq/201410/t20141017\\_3425404.htm](http://www.court.gov.cn/zgcpwsw/zgrmfy/zscq/201410/t20141017_3425404.htm)

<sup>144</sup> See case *Qihoo v. Tencent* [2013], *supra* n 143

<sup>145</sup> See case *Qihoo v. Tencent* [2013], *supra* n 143

## (2) Dominant position

Another difficulty in antitrust action is the determination of the dominant position. Article 18 of AML provides the factors that should be considered for determining the dominant position of undertakings, including: (i) the market share and competition situation; (ii) the power of the alleged undertaking to control the sales market or resources market; (iii) the financial and technical conditions of alleged undertaking; (iv) the level of dependence of other undertakings on this alleged undertaking; (v) the entry barrier; (vi) other related.<sup>146</sup> Article 19 of AML prescribes the criteria of the market share for the rebuttable presumption on the dominant position: (i) the market share of one undertaking accounts for 1/2; (ii) the market share of two undertakings accounts for 2/3; (iii) the market share of three undertakings accounts for 3/4; unless the undertaking therein has less than 10% of the market share.<sup>147</sup> The court can adopt this presumption and the alleged undertakings can rebut this presumption. The Claimant should undertake the burden of proof on dominant position, except two rebuttable presumptions on the dominant position. Article 9 of the Judicial Interpretation on AML provides the rebuttable presumption on the dominant position of the public utilities or other business operators that have the monopoly operation qualification according to the law.<sup>148</sup> Article 10 provides that the rebuttable presumption on the dominant position of the defendant according to the information released by itself to the public.<sup>149</sup>

In the case *Qihoo v. Tencent*, Qihoo claimed that the market share of Tencent exceeded 50% and Tencent had the power to control the transaction conditions so that the new entrant could be prevented from entering the market. Therefore, it alleged that Tencent should be presumed as holding the dominant position. Tencent contested the claim of no entry barrier in the IM service market and the underlying substitutes as being large in number. The Supreme Court indicated that the claimant failed to define the relevant market and could therefore not verify the dominant position according to the 50% market share criteria in Article 19 of AML. The Supreme Court opined that in this case, even if the market share exceeded 50%, the dominant position cannot be presumed due to other factors, such as the entry barrier, the behaviour of the defendant in the market and competition restraints in the internet market.<sup>150</sup> On the issue of the defendant controlling quality, quantity or other transaction conditions, the Supreme Court proposed that the competition in the IM service market was intense and there were substantial substitutes. As to the financial and technical conditions of the defendant, the Supreme Court stated that the IM service market did not have a high financial and technical threshold and there were several competitors that could compete with defendant. Likewise, the customers had less dependence on the defendant's products. Therefore, the Supreme Court denied the dominant position of the defendant.

## (3) Abusive behaviour

Article 17 of AML enumerates the 6 different types of abusive behaviour: (i) unfair high or low purchase price; (ii) selling of the commodities at loss without justifiable reason; (iii) refusing the deal without a justifiable reason; (iv) exclusive deal without a justifiable reason; (v) tying or other unreasonable transaction conditions without a justifiable reason; (vi) the differential prices and other transaction conditions.<sup>151</sup> SAIC has the competence to determine other abusive

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<sup>146</sup> Article 18 of AML

<sup>147</sup> Article 19 of AML

<sup>148</sup> Article 9 of Judicial Interpretation on AML

<sup>149</sup> Article 10 of Judicial Interpretation on AML

<sup>150</sup> See case *Qihoo v. Tencent* [2013], *supra* n 143, 71-72; see Tiancheng Jiang, 'The Qihoo/ Tencent Dispute in the Instant Messaging Market: The First Milestone in the Chinese Competition Law Enforcement?', *World Competition* 37, no. 3 (2014), 379

<sup>151</sup> Article 17 Subsection 1 (1) to (6) of AML

behaviours of dominant positions.<sup>152</sup> In the case *Qihoo v. Tencent*, Qihoo claimed that Tencent's behaviour fell within Article 17 Subsection 1 (5) of AML. The Supreme Court denied the defendant's defence that his behaviour was self-help and addressed that it exceeded the necessity.<sup>153</sup> It also refused the claimant's allegation on illegal tying.<sup>154</sup>

#### IV. Summary

As discussed above, the antitrust private enforcement is established in China since 2008 in Article 50 of AML. The Judicial Interpretation on AML provides a basic framework for antitrust action. In respect of the standing of antitrust damages action, the standing of direct purchasers and competitors has been confirmed in the settled cases. It is not clear whether indirect purchasers should be awarded with the standing to sue. Provisions regarding the onus of proof in the Judicial Interpretation on AML are sketchy; it may be necessary for the legislator or the Supreme Court to provide more detailed rules. A detailed guideline is significant for the damages calculation in the future. Furthermore, it is still not clear whether public interest action can be used in antitrust damages action and the organization or state body should be awarded the standing.

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<sup>152</sup> Article 17 Subsection 1 (7) of AML

<sup>153</sup> See case *Qihoo v. Tencent* [2013], *supra* n 143, 76-78

<sup>154</sup> See case *Qihoo v. Tencent* [2013], *supra* n 143, 78-79

## Chapter B Antitrust damage action in the European Union

### I. Legal framework: Any individual's right to full compensation as the first and foremost guiding principle

Full compensation as the first and foremost guiding principle of the private antitrust damages action was emerged from the judgment of the case *Courage and Crehan* handed down by the Court of Justice. It followed that the Commission referred to it as the most important principle in the White Paper and the subsequent Directive. The principle of full compensation provides 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.’<sup>155</sup> ‘Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus payment of interest.’<sup>156</sup> ‘Full compensation ...shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.’<sup>157</sup> It is clear that the principle of full compensation offered the norm for awarding the standing to sue in an EU antitrust damages action. In this section, the interpretation of the right to full compensation in early cases by the Court of Justice and in documents by the Commission will be introduced in the first place. Then provisions in the Directive about the standing to sue along with the burden of proof, the calculation of damages as well as other issues will be discussed.

#### 1. Legal foundation of antitrust damages actions: Articles 101 and 102 TFEU

One of the significant goals of modernization in EC competition law is to decentralize the enforcement system, in which Articles 101 and 102 TFEU can be applied directly by national authorities and courts. In order to ensure the effectiveness of this decentralized system, private enforcement has been deemed a significant complement to public enforcement at both the European and the national level.<sup>158</sup> Under the decentralized enforcement system, national courts play an increasingly important role, which provides the likelihood that an individual can rely on a breach of Articles 101 and 102 TFEU to bring an action in damages before the national court.

Article 101 (1) provides a general prohibition of the horizontal and vertical restrictions, which may consist of all forms of agreements, concerted practices and decisions by undertakings or trade associations as their effect or object might be the prevention, restriction or distortion of the competition within the internal market.<sup>159</sup> The legal consequence of the collusion in the first paragraph is automatically void, unless it can be exempted by the Commission pursuant to

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<sup>155</sup> Article 2 of the amendments by the European Parliament to the Commission proposal for 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

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> See Sara, Drake, ‘Scope of *Courage* and the principle of “individual liability” for damages : further development of the principle of effective judicial protection by the Court of Justice’, (2006) 31 *E.L. Rev.* 841-842.

<sup>159</sup> Article 101 (1) TFEU ; Moritz Lorenz, *An introduction to EU competition law* (Cambridge University Press, 2013), 62-63

Article 101 (3).<sup>160</sup> Article 102 governs the situation of any undertaking abusing its dominant position to restrict or distort the competition mechanism of the market.<sup>161</sup>

## 2. Cases by the Court of Justice

### a. *Courage and Crehan*

When discussing whether parties to the agreement violating the Articles 81 and 82 can rely on Community competition rules to ask for a remedy before national courts, the Court of Justice confirmed in the early case '*Courage and Crehan*', '*the principle of automatically void which is specified in Article 101(2) can be relied on by anyone, unless the illegal conducts can be granted an exemption by the Commission according to the Article 101 (3)*'.<sup>162</sup>

Mr Bernard Crehan, the defendant in the main proceedings of the case '*Courage*', concluded lease contracts with IEL, a company owned by Courage (the brewery) and Grand Met. The contract included provisions of an exclusive purchase obligation of beers from Courage with a fixed minimum quantity and a fixed price. Mr Crehan argued that this dealer's exclusivity violated Article 85 (now Article 101) of the Treaty, which placed him at a disadvantageous in the competition with the other independent tenants of pubs.<sup>163</sup>

However, English law rejected the party possibly obtaining a profit from its own illegal behaviour. So the Court of Appeal applied a preliminary ruling to the Court of Justice to answer the question whether the Community competition law awarded a recovery for the loss the co-contractor sustained, even though the aforementioned contract is a breach of Article 101 TFEU and the national competition law.<sup>164</sup>

### aa) Decision of the Court of Justice: 'any individual'

#### (1) Co-contractors' right to sue

One of the main disputes in this case is whether co-contractors to the illegal vertical restriction are able to sue for the loss suffered.<sup>165</sup> The Court of Appeal in England held that the standing of an illegal party relying on its own guilty to bring an action in damages or in restitution should

<sup>160</sup> Moritz Lorenz, *Supra* n 159, 62-63

<sup>161</sup> Moritz Lorenz, *Supra* n 159, 211

<sup>162</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 22.

<sup>163</sup> In the literature, the claim of Crehan was deemed as a 'restitutionary damages' because he did not claim for the loss of profit. What he claimed for is the restitution based on the tort. See Assimakis P. Komninos, New prospects for private enforcement of EC competition law: *Courage v. Crehan* and the Community right to damages, CMLR 39 (2002), 461-462.

<sup>164</sup> After the preliminary ruling, the final result of Case *Courage* was that the Claim of Mr Crehan was dismissed by the High Court in England. The High Court expressed its opinion in the Judgment that the two conditions of the Delimitis are not satisfied without mentioning the Judgment of the ECJ. Disputes referred to by the Court of Appeal are: i) Under Article 81 EC whether the co-contractor can rely on his own guilty to pursue a damage action before courts?; ii) Whether the adherence to the illegal agreement resulted in the capacity for him to obtain a recovery from his damage?; iii) Under the Community law whether the principle of *nemo auditur propriam turpitudinem allegans* should be disapplied?; iv) Whether there are some certain circumstances where the rule above is inconsistent with Community law?

<sup>165</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 16

be rejected, which is consistent with the rule of *nemo auditur propriam turpitudinem allegans*.<sup>166</sup> On the one hand, Morritt L.J. submitted that the objective of Article 81(1) does not exist to protect the party of an illegal agreement, which was confirmed in the earlier settled case *Gibbs Mew Plc v. Graham Gemmell*.<sup>167</sup> Consumers and competitors rather than co-contractors should be awarded with the protection under Article 81(1). On the other hand, Morritt L.J. opined that the rule of *nemo auditur propriam turpitudinem allegans* did not conflict with the Community law, because Mr Crehan has the duty to ‘mitigate his damages by never entering into the agreement’.<sup>168</sup> Although Crehan also suffered the losses, it cannot be denied that the cause of action was produced by his behaviour.

It is explicit that the Court of Justice underlined the right of any individual to sue in its judgment. The conception of ‘any individual should be protected under Article 81(1)’ has been raised as below:

*Any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.*<sup>169</sup>

Mr Mischo indicated that Community law did not preclude national rule such as the *nemo auditur propriam turpitudinem allegans* rule to be applied in a member state. What should be precluded by Community law is prohibiting the co-contractor to bring any antitrust action ‘on the sole ground of him being a party to the agreement’.<sup>170</sup>

## **(2) ‘Any individual’ and the party who has ‘significant responsibilities’**

The Court did not intend to give the answer to the question as to whether the co-contractor Mr Crehan, in this case, should be awarded the compensatory damage. When answering the question as to who should be awarded the damage, apart from ‘any individual’, the Court also addressed that the estimate should be made according to the responsibilities of the co-contractors on the illegal agreement, by using the phrase:

*Provided that the principles of equivalence and effectiveness are respected, Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party.*<sup>171</sup>

Mr Mischo cited the opinion of the Italian Government that ‘the injured party who was in a markedly weaker position did not enjoy real freedom of choice’.<sup>172</sup> For example, a producer of a good who has considerable market power may force an upstream or downstream to conclude a vertical agreement. The vulnerable party may commit to the illegal agreement which may not be in accord with their real interest. The commitment also may not be due to voluntary conduct by the vulnerable party of the market. Of course, the possibility that they suffered injury from their own conduct can also not be denied. Therefore, Mr Mischo indicated that Community law

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<sup>166</sup> About the claim brought by Crehan, the academics opined that it is a controversial question. Actually Crehan did not pursue a damage for his loss or future losses. What he asked for was ‘restitutionary damages’, which ‘were in the borderland between damages and restitutions’. See Assimakis P. Komninos, *supra* n 163, 461-462.

<sup>167</sup> *Gibbs Mew PLC v Graham Gemmell*, 2 Eur. L. Rep. 588 (1998) ; See Assimakis P. Komninos, *supra* n 163, 461-462; See Okeoghene Odudu, and James Edelman, ‘Compensatory damages for breach of Article 81’, (2002) 27 *E.L. Rev.* 328

<sup>168</sup> *Gibbs Mew PLC v Graham Gemmell*, 2 Eur. L. Rep. 588 (1998)

<sup>169</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 24

<sup>170</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), paras 31-34.

<sup>171</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 31

<sup>172</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), para 66

precluded national rule which denies the capacity of a co-contractor to sue without estimation of the co-contractor's responsibility.<sup>173</sup>

Nevertheless, if the litigant is a co-contractor in the strong market power, who has born the significant responsibilities for the illegal contract, the question as to whether the damage should be awarded should be assessed by the national court according to the evidence and situations of the case in the context of the national legal system. Mr Mischo endorsed that vulnerable co-contractors should be awarded compensation of no more than the loss they have suffered, otherwise an unjust enrichment may occur.<sup>174</sup>

The Court of Justice indicated the connection between the full effectiveness of Article 85 EC and the standing of claimants as to private antitrust action in its Judgement. In other words, the full effectiveness of Article 85 EC cannot be ensured where victims are not allowed to bring an antitrust action with opportunities, even if victims are co-contractors. In order to explain, the Court further illustrated that: firstly, it is the duty of national courts to apply the legal order created by the Treaty, especially in respect of the individuals' rights granted by the Treaty. Secondly, the principle of automatic nullity of the agreements (and practices) that fall within Article 85(1) EC and do not meet the conditions of Article 85(3) is governed by Article 85(2), which can be relied upon by anyone, even the co-contractors and the third parties. Thirdly, national courts should maintain the effectiveness of the direct effect imposed by Articles 85(1) and 86 on individuals, as well as protect the individuals' rights conferred by these two Articles.<sup>175</sup>

### **(3) Judicial Protection of individual rights and effectiveness of the Community competition law**

Advocate General Mischo confirmed the significance of an action for damages regarding the protection of individuals' rights and the full effectiveness of the Community competition law.<sup>176</sup>

*The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(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 contract liable to restrict or distort competition.*<sup>177</sup>

First of all, the Court of Justice cited the early case *Van Gend en Loos*, *Costa and Francovich and Others* to illustrate that the *effectiveness of judicial protection* should be ensured under Community law.<sup>178</sup> In other words, Community law grants the individual the rights as their 'legal assets'. Secondly, the Court of Justice indicated that a horizontal or vertical agreement which is violates Article 85 (1) and cannot satisfy the conditions for the exemption in Article 85(3) should be deemed as 'automatically void' according to Article 85(2).<sup>179</sup> Mr Mischo mentioned in his opinion that the 'automatically void' is a basic sanction applied to the illegal monopoly agreement under Community competition law, which may become less effective due to obstacles, such as the prohibition of the co-contractors to sue.<sup>180</sup> Thirdly, the Court of Justice confirmed that provisions of Community competition law created direct effects between

<sup>173</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), para 60

<sup>174</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), para 59

<sup>175</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, paras 17-23

<sup>176</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), paras 54-58

<sup>177</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 26

<sup>178</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 19; see Assimakis P. Komninos, *supra* n 163, 464; see Okeoghene Odudu, and James Edelman, *supra* n 167, 329-330.

<sup>179</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, paras 20-22

<sup>180</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297(AG Opinion), para 22

individuals and the granted rights to individuals.<sup>181</sup> Given that the application of the Community Law has been submitted by the Court of Justice in the early case law of *BRT* and *Delimitis*, the rights imposed on individuals by the Treaty should be safeguarded by the national courts.<sup>182</sup>

The judgment of *Courage* also specified the pivotal role of national courts played in the antitrust private damage action.

*'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).'*<sup>183</sup>

The national court is able to apply the Community law in order to protect an individual's rights and safeguard the full effectiveness of Community law by means of judicial procedure. It is within the national court's competence to define the term of '*significant responsibilities*' in accordance with the economic and legal situation of the litigants in the market, which may include '*the bargaining power and conduct of the two parties to the contract*'.<sup>184</sup> The national court has the power to bar any party with significant responsibilities to obtain compensation under Community and national competition rules in the context of the domestic legal system.

When deciding the jurisdiction of the national courts on the procedural issues in this case, the Court confirmed that it is the national court that has the knowledge on the domestic procedural rules and the Community competition law to make the decision as to EU antitrust action. In the judgment and the opinion of Mr Mischo it is vital for the national courts to apply the national procedural provisions to determine the concrete questions of the Case with the minimum request of principles of effectiveness and equivalence.<sup>185</sup>

#### **bb) Case *Courage*'s contribution to the standing of private damages action under EU competition law: 'any individual' without significant responsibilities**

One of the significances in the judgment of *Courage* was its first time of affirmation concerning the standing to sue in an antitrust damages action as they should be awarded to '*any individual*' who suffered loss due to the breach of Community competition law by the Court of Justice. It also led to further steps as to the improvement of private antitrust damages action in the whole of the EU. However, it cannot be denied that the obscure attitude of the Court of Justice in this case also generated a lot of controversies and different arguments regarding the standing of claimants in antitrust damages action.

Firstly, it is not clear whether the Court of Justice created a liability in damages between individuals in *Courage* as a result of the breach of Community Competition Law, similar to the state liability to an individual in the judgment of *Francovich*.<sup>186</sup> In *Francovich*, the Court of Justice indicated that '*a state must be liable for loss and damage caused to individuals as a*

<sup>181</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, paras 20-22

<sup>182</sup> Case 127/73, *BRT v SABAM* [1974] ECR 51, paras 15-16; Case C-234/89, *Delimitis* [1991], ECR I-938, para 45

<sup>183</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 29

<sup>184</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 32

<sup>185</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297 (AG Opinion), paras 22

<sup>186</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991], ECR I-05357

result of breach of Community law....’<sup>187</sup> State liability to individuals should be safeguarded by national courts.<sup>188</sup> Compared with the judgment of case *Francovich*, the Court of Justice used the similar references and expressions (such as the citation of *Van Gen den Loos* and *Costa* in paragraph 31), but did not explicitly answer the question whether the right to damages in *Courage* is derived from Community competition law. The Court of Justice used the phrase ‘there should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.’<sup>189</sup> It was followed that the Court of Justice confirmed the competence of national courts in regards to the private antitrust action with the minimum request of principles of effectiveness and equivalence.<sup>190</sup> Because the question that the right to damages is derived from the Community law or national law was not clear, it caused a stir in regards to the explanations given in the judgment of *Courage* by commentators. Supporters of the narrow interpretation (or the traditional interpretation) submitted that it was a total national law issue. It suffices for the national procedural provisions to figure out the results of the damages claims of a breach of Articles 81 and 82, even though the national courts should comply with the principles of effectiveness and equivalence of Community Law.<sup>191</sup> It followed that the Court of Justice expressed some deference regarding the national autonomy in *Courage* judgment.<sup>192</sup>

Opponents of the narrow interpretation argued that the adherence to the national autonomy happened at the expense of the uniform application of the judicial protection.<sup>193</sup> In order to ensure the uniform application of the judicial protection in different member states, acknowledgement of the existence of the Community right to antitrust damages is necessary.<sup>194</sup> The other comments on this issue are the Court was seeking a balance between uniform enforcement and the autonomy of the domestic legal system in Member States in the judgment of *Courage*<sup>195</sup>, which was reconfirmed in the *Manfredi* that ‘the exercise of the right derived from Community Law should be specified by the national legal system (including the concept of ‘causal relationship’) under the principles of effectiveness and equivalence’.<sup>196</sup>

Secondly, although the judgment affirmed that ‘any individual’ who suffering loss due to a breach of Community competition law should be allowed to sue (only if they did not burden significant responsibilities in illegal behaviours), there were disputes regarding the question whether the term ‘any individual’ should be confined to co-contractors and competitors.<sup>197</sup> The Germany and Italy adopted different attitudes on the standing of consumers to sue.<sup>198</sup> In *Manfredi* the Italian court asked the question whether the third parties (including consumers) should be entrusted to bring a damage action against the agreement or practice of a breach of Article 81 EC if there were a ‘causal relationship’ between the illegal agreement (or practice) and the harm.<sup>199</sup> The Court answered the question affirmatively by repeating the phases in *Courage*<sup>200</sup> and expressed in the Opinion of Mr. Geelhoed that the interests of the consumers

<sup>187</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991], ECR I-05357, para 35

<sup>188</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991], ECR I-05357, paras 32-35

<sup>189</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 28

<sup>190</sup> C-453/99, *Courage and Crehan* [2001], ECR I-06297, para 29

<sup>191</sup> See Assimakis P. Komninos, *Common Market Law Review* 39, 2002, 456;

<sup>192</sup> See Sara Drake, *supra* n 158, 848

<sup>193</sup> Sara Drake, *supra* n 158, 848; see Assimakis P Komninos, *supra* n 163, 455-457;

<sup>194</sup> Ibid; In Advocate General Jacob’s Opinion of *AOK Bundesverband* in 2003, ‘the Community right to damages’ has been confirmed that ‘I have no doubt that both damages and injunctive relief would as a matter of Community law be available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness.’

<sup>195</sup> See Sara, Drake, *supra* n 158, 845

<sup>196</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, paras 62-64; see Assimakis P Komninos, *supra* n 163, 855.

<sup>197</sup> See Assimakis P Komninos, *supra* n 163, 855-856.

<sup>198</sup> See Assimakis P Komninos, *supra* n 163, 855-856; after the *Courage*, the Germany did not allow consumers to bring antitrust action. By contrast, Italy adopted the opposite opinion.

<sup>199</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, paras 20(2) and 21(3)

<sup>200</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, para 59

are protected by competition law and should therefore be protected by private actions according to the competition law.<sup>201</sup>

### **b. *Manfredi***

The Court of Justice reconfirmed in the case *Manfredi* that ‘any individual can rely on a breach of Article 81 EC before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that article’.<sup>202</sup> The third party can claim antitrust damages, only if there is ‘a causal link’ between the damages and the illegal behaviour.<sup>203</sup> As regards the procedures of the antitrust damages action, the Court of Justice held that the domestic legal system should have the competence to designate courts and tribunals to try the action and to lay down the procedural rules on the action, subject to the principles of effectiveness and equivalence.<sup>204</sup> On the question whether the punitive damages should be allowed, firstly, the Court of Justice indicated that the compensation should consist of the actual loss, the loss of profit and the interest.<sup>205</sup> Secondly, it is the duty of the domestic legal system to decide whether to award punitive damages.<sup>206</sup>

### **c. *Otis*: European Commission as claimant in antitrust actions**

The Court submitted that EU institutions are the ones also enjoying the right to bring an action against practices of a breach of Articles 101 and 102 of the Treaties in the Judgement of *Otis and Others*.<sup>207</sup> Several institutions of the EU concluded contracts with the manufacturers of elevators and escalators for the installation, maintenance and renewal of elevators and escalators in their buildings. The Commission as the representative of the EU brought an action for compensation against these manufacturers of elevators and escalators relying upon the cartel decision that has been determined by the Commission itself previously. The disputes concentrated on the capacity of the Commission as the representative of the Union to bring an antitrust damages action and whether it will lead to some unfair circumstances in the proceeding due to the possibility of violating the principle of *nemo iudex in sua causa*<sup>208</sup> and the principle of the equality of arms.

The Court confirmed the representative capacity of the Commission to bring the action before the national courts pursuant to Article 282 EC which prescribed ‘the Community shall be represented by the Commission’ in the first place.<sup>209</sup> Although the related contracts were

<sup>201</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619 (AG Opinion), para 31

<sup>202</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, para 59.

<sup>203</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, para 61.

<sup>204</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, paras 72, 92.

<sup>205</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, paras 95-97.

<sup>206</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006], ECR I-06619, paras 98-99.

<sup>207</sup> Case C-199/11, *Otis and Others* [2012], ECLI:EU:C:2012:684

<sup>208</sup> The principle is that no one should be the judge in his own case.

<sup>209</sup> Case C-199/11, *Otis and Others* [2012], para 34; the EU as an international organization is able to perform legal activities and bear legal responsibilities with the empowerment of subjectivity of the International law prescribed by Article 47 TEU. Non-member states of the EU will accept the legal personality of the EU as an international organization and simultaneously the EU should act as an international organization to enforce its competence and undertake its obligations. The representative capacity of the EU in the international law is shared by the Commission and its President, the European Council and its President. Article 282 EC confirmed the legal capacity of the Community as a legal person under the law of member states. It follows that in order to ensure the performance of this legal capacity, the Commission shall act as a representative of the Community. Strictly speaking, the representation of the Commission which is prescribed in Article 282 EC consists of the actions of the Community, the conclusion of the treaties and the representation in administrative and justice procedures. A changed structure of the representation which is envisaged by Article 335 of the Treaty of Lisbon have been created in order to lead the

signed by the institutions respectively and the costs were within the budget which belongs to the duty of the institution respectively, pursuant to Article 282 EC, the representation of the Commission to bring an action should not be precluded.<sup>210</sup> Secondly, the Court of Justice cited the phrase in *Courage and Manfredi* that 'any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC' in order to reconfirm the standard of the legal standing in the antitrust damages action.<sup>211</sup> The Court of Justice indicated forthwith that the EU also retains the right to bring an action for compensation when 'the causal relationship' existed in this case.<sup>212</sup> In the light of the analysis above, the Commission can present the institutions of the EU as the victims to bring the action before the national courts in this case.

The question is whether it would cause an impairment of the principle of no one can be a judge in his own case when one of the possible grounds of the judgement is the decision of the Commission acting on behalf of the public authorities and also as the private victims on this issue.<sup>213</sup> Especially where Article 16 of the Regulation 1/2003 provides the uniform application of Community competition law, the national courts shall avoid the adoption of a decision which may create conflicts with the decision of the Commission. The cooperation between the Commission and the national courts plays a vital role in the enforcement of Community competition law which may provide an effective mechanism of enforcement apart from the public enforcement which initiated by the Commission and the national competition authorities. On the other hand, it is beyond doubt about the values of the private actions before the national courts regarding relieving the loss sustained by the victims in the market are beyond doubt. If that is the case, it follows that the controversies as to whether the defendants are in the disadvantageous position if they are confronted with the Commission even before commencing the proceeding of the litigation. The legality of the decision of the Commission can be reviewed exclusively by the Court of Justice.<sup>214</sup> The Court of Justice will take all the elements of the law and facts into account in order to arrive at a justice decision. Thus, the lawfulness of the decision of the Commission can be ensured by the independence of the Court of Justice and its judicial review.<sup>215</sup>

However, is it possible that the judgement of the antitrust damages actions by the national courts in the case of a uniform application of the Community law and the cooperation with the Commission will be affected by the sophisticated role of the Commission in the case? The analysis of the Court of Justice in the judgement was only confined to the unlimited jurisdiction of the referring court because the referring court had the opportunity to 'apply a preliminary ruling on the validity of the Commission decision; on the other hand, the person who has doubts can challenge its validity before General Court.'<sup>216</sup> In the Opinion of the Advocate General Mr Cruz Villalón, 'this argument ... is, ..., unfounded despite its apparent persuasiveness'.<sup>217</sup> He pointed out that the sophisticated role of the Commission is 'merely the consequence of the normal distribution of powers within a complex political-administrative organisation, whose

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representation to be undertaken by various institutions within EU. In order to ensure the Union to enjoy the legal capacity in member states, the Commission should enact representation. As regards the administrative autonomy the other institutions can represent the EU in areas of their respective operation. (Article 335 TFEU) However the standing of the Commission to present the Union as a party in the legal proceeding has not been altered. In this case the Article 335 of the Treaty of Lisbon was not taken into consideration because the date when the action was brought before the court preceded the Treaty of Lisbon entering into effect.

<sup>210</sup> Case C-199/11, *Otis and Others* [2012], para 34

<sup>211</sup> Case C-199/11, *Otis and Others* [2012], para 43

<sup>212</sup> Case C-199/11, *Otis and Others* [2012], para 44

<sup>213</sup> Case C-199/11, *Otis and Others* [2012], para 26 (2) (a)

<sup>214</sup> Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], ECR I-04199, paras 12-20

<sup>215</sup> Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], ECR I-04199, paras 12-20.

<sup>216</sup> Case C-199/11, *Otis and Others* [2012] (AG Opinion), paras 52-55.

<sup>217</sup> Case C-199/11, *Otis and Others* [2012] (AG Opinion), para 39

*tasks include the design and implementation of public policies, but also the defense of its legitimate rights and interests before any court*.<sup>218</sup>

### **3. From Green Paper to the Directive on antitrust damage action**

The modernisation of the competition law enforcement laid down by Regulation 1/2003 aims to establish a decentralized enforcement system, in which national courts play a key role.<sup>219</sup> They are able to apply Articles 101 and 102 TFEU directly and fully.<sup>220</sup> The Regulation 1/2003 states explicitly that national courts have the competence to safeguard the individual rights under the Community law, such as ‘*awarding damages to victims of the infringement*’.<sup>221</sup> Nevertheless, neither the Regulation 1/2003 nor the case law of the Court of Justice provided detailed rules regarding the antitrust damages action. As discussed above, the case *Courage* and *Manfredi* intended to create an individual right granted by Community law, which is protected through national substantive and procedural law. As a response to the case *Courage* and *Manfredi*, the Commission issued a Green Paper, a White Paper and a drafted Directive on antitrust damages action so as to improve the ‘*underdevelopment*’ situation of the antitrust action in most of Member States. The final Directive was released in December 2014.

#### **a. Antitrust action in the Green Paper, White Paper and the Directive**

In 2005, the Commission published a *Green Paper on Damages Actions for Breach of the EC Antitrust Rules* (hereinafter, Green Paper) and the Staff Working Paper as a response to *Courage* in order to identify any obstacles in antitrust actions and provided the possible options for removing these obstacles. The subsequent *White Paper on Damages Action for Breach of the EC Antitrust Rules* (hereinafter, White Paper) was published in 2008 to submit suggestions as to obstacles identified in the Green Paper. After the preparatory work of the Green and White Papers by the Commission, pursuant to Article 103 TFEU, the Commission adopted a Proposal governing the antitrust damages action in June 2013. The Directive 2014/104/EU on antitrust damages action was signed into law in November 2014 and published in December 2014.<sup>222</sup> Following this data, Member States have two years to adapt their national laws so as to satisfy the requirements laid down by the Directive.

Roughly summing up the content of the Green Paper and White Papers, two major problems can be concluded as the task of the future Directive. The first one concerns the concrete obstacles existing in the substantive and procedural Member States law, which impeded the effective antitrust action brought by private parties. The Green and White Papers identified the obstacles and issues in need of further clarification, including: i) the standing of indirect purchasers and the passing-on issue; ii) measures to lighten the burden on the claimant to bring the action and relieve the information disadvantages of the claimant, such as access to evidence, binding of the decision of competition authorities, proving the fault and the estimating damages; iii) collective action and other consolidated action; iv) issues such as jurisdiction, limitation period and costs of action. The Commission aimed to provide a minimum level of protection in regards to individual rights granted by the Community competition law and harmonization of the Member States law to ensure such protection in the future Directive. Some of the measures discussed in Green and White Papers were provided in the final Directive, such as the standing

<sup>218</sup> Case C-199/11, *Otis and Others* [2012] (AG Opinion), para41

<sup>219</sup> Regulation 1/2003, recital 7

<sup>220</sup> Regulation 1/2003, recital 7, Article 6

<sup>221</sup> Regulation 1/2003, recital 7

<sup>222</sup> Directive, recital (7) to (8)

of indirect purchasers and passing-on overcharge, the access to files, the binding effect, the quantification of damages and the consensual dispute resolution. Other issues which were not mentioned in the Directive should be governed by the national law of Member States, (for instance, the collective action or other consolidated action).

The second problem the Commission intended to clarify was the role of private enforcement and the relationship between it and the public enforcement. The Commission addressed that private enforcement is one significant pillar of the EU antitrust enforcement system. Private enforcement should be independent from public enforcement, on the one hand, and cooperate with the public enforcement in '*a coherent manner*' as well as complement public enforcement, on the other hand. First of all, both follow-on and the stand-alone actions are allowed to be filed by private parties. Private enforcement offers the injured persons the opportunities to step forward proactively rather than wait for the investigation by the Commission or national competition authorities. The antitrust action also offers injured persons the prospect to bring the infringement of EU competition law to an end and obtain the compensatory damages caused by it (the injunctive and compensative relief).

Secondly, the Directive carries the achievement of the Green and White Papers to underline the co-existence of private and public enforcement, as well as the demand to improve the ineffectiveness of the private antitrust damages actions in Member States. On the one hand, the Directive stated that the interaction of the private and public enforcements should focus on safeguarding '*the maximum effectiveness*' of the competition rules.<sup>223</sup> First of all, the public enforcement does not lose its significance in the EU enforcement system consisting of not only the Commission, but also national authorities (NCA) and judicial authorities of Member States.<sup>224</sup> Secondly, the cooperation between the public and private enforcements should be arranged '*in a coherent manner*', which encourages individuals to file private action but do not impair the effectiveness of public enforcement.<sup>225</sup> The cooperation will appear on the issue of the binding effect of the decision from public authorities as to a follow-on action. Besides, the rules on the disclosure of the relevant evidence which is in the hand of the public authorities to the private litigants should also be carefully examined, especially including the critical evidence of the leniency program and the settlement. As Recital (5) of the Directive confirmed, '*actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.*'<sup>226</sup>

## **b. Goals of antitrust action in the EU**

The White Paper explicitly indicated explicitly the significance of the compensation in private enforcement and highlighted that the principle of full compensation should be valued as 'the first and foremost guiding principle'.<sup>227</sup> The Commission identified the principal goal of the White Paper as '*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 the EC antitrust rules.*'<sup>228</sup> The White Paper further addressed '*the deterrence of future infringements*' and '*greater compliance with EU antitrust law*' as the side-effect of the '*improving compensatory justice*'.<sup>229</sup> Private enforcement can increase the detection rate and bring the infringement to an end.

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<sup>223</sup> Directive, recital (6)

<sup>224</sup> Directive, recital (2)

<sup>225</sup> Directive, recital (6)

<sup>226</sup> Directive, Recital (5)

<sup>227</sup> White Paper, 1.2

<sup>228</sup> White Paper, 1.2

<sup>229</sup> White Paper, 1.2

It followed that the right to full compensation was laid down in Article 3 of the Directive as a major principle and the right to compensation granted by the Community competition law need to be protected by the national *'procedural rules ensuring the effective exercise of that right'*.<sup>230</sup> Instead of deterrence, the Directive underlined divergence of the national rules in different Member States and possible ineffectiveness generated by it. This divergence regarding the enforcement of the right to compensation will result in *'an uneven playing field'* for the parties participating in the action and legal uncertainty considered as *'the cross-border'* issue.<sup>231</sup> It is evident that the Directive focused more on the goal of compensation and the effectiveness of the procedures more than the question as to whether the present rules can reach an optimal enforcement and create a deterrence for the underlying violations. However, it cannot be denied that the effective litigation mechanism, the amount of damages and legal certainty will inevitably contribute to the deterrence effect of the competition law and decrease the desire of undertakings to commit a violation, or make the violation less profitable for them, or increase the possibility of being caught. The question whether the additional deterrence effect is needed in the EU private antitrust action will be discussed in the next chapter.

## **II. Provisions of the Directive on the right to full compensation in Community competition law**

### **1. Right to full compensation in the Directive: Article 3**

The principle of full compensation has been explicitly described in Article 3 of the present Directive as follows:

*'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 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.'*<sup>232</sup>

### **2. Standing of injured persons**

The Directive reiterated in *Courage* and *Manfredi* that damages can be claimed by any person including individuals, undertakings or public authorities yet only if he suffered the harm due to a violation of Articles 101 and 102 TFEU. The injury could happen to co-contractors, purchasers or downstream of infringers (direct or indirect purchasers), potential customers (who would have purchased the product without the violation), suppliers, competitors, new entrants,

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<sup>230</sup> Directive, recital (4)

<sup>231</sup> Directive, recital (7) to (9)

<sup>232</sup> Article 3 of the Directive

umbrella customers (customers of non-cartel members) and deadweight loss customers (the ones who abandon or decrease their demand due to the rise of price).<sup>233</sup>

As concerned the standing of co-contractors, as mentioned above in *Courage*, the Court of Justice confirmed that co-contractors who rely on the breach of the Community competition law should be allowed to pursue and obtain damages.<sup>234</sup> The Court of Justice indicated that national rules rejecting a party with '*significant responsibility*' for the violation do not preclude anything under Community law.<sup>235</sup> The co-contractors should be warranted the rights to sue where they are in a '*markedly weaker position than the other party*' so that they have less bargaining power in the market to determine their behaviour.<sup>236</sup>

Usually there is little dispute regarding the question whether direct purchasers should have the standing to sue for their loss due to violation of Articles 101 and 102. The problem is on indirect purchasers, that is, whether indirect purchasers can be deemed as claimants in the antitrust damages actions. Especially, disputes tend to revolve around excessive litigations by indirect purchasers ('floodgates argument') and the standard on proving causation because of the remoteness of damages and the uncertainty of the existence of passing-on overcharge.<sup>237</sup> The standing of indirect purchasers to file the claim has been confirmed explicitly in Article 12 of the Directive, which provides that '*to ensure the full effectiveness of the right to full compensation..., Member States shall ensure that, ... compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer;...*'.<sup>238</sup> The Directive lays down the provision regarding the burden of proof on passing-on overcharge in the subsequent Article 14 which will be discussed below in detail.

Another important party that may suffer the damages is the competitor of the infringers. The Green/ White Paper and the subsequent Directive did not pay more attention to facilitating competitors to bring the action, compared with indirect purchasers. But the right to sue of competitors to sue cannot be denied according to the '*any individual*' rule. Virtually, awarding competitors with the right to sue has some special significance, especially where the purchasers are reluctant to sue because of a close business relationship. Moreover, the competitors' right to sue is still significant where the infringers are committed to the exclusionary practice. Under such circumstances, purchasers are not the major injured parties and in some cases receive benefits from the illegal practice at the outset. In addition, the standing of public authorities which has already been discussed in the case *Otis* by the Court of Justice is reaffirmed in the recital (16) of the Directive.

### 3. Available types of private litigation and remedies under EU antitrust law

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<sup>233</sup> The umbrella customers are customers of the competitors of the cartellists who have suffered an illegal overcharge due to the rise of the market price caused by the cartel ('umbrella effect'). The Court of Justice confirmed the right of umbrella customers to obtain full compensation in the case *Kone AG and Others v ÖBB Infrastruktur AG*. See Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317. The deadweight loss customers are the ones decreasing their demand or turned to a substitute due to the increase of price caused by the cartel and suffered the loss of profit as a consequence. In the case *Courage* by the Court of Justice and the *Directive on antitrust damages action* by the Commission, '*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*'. Accordingly, deadweight loss customers have the right to bring an antitrust action before the national court in theory. But it is literally quite hard for them to realize their rights to full compensation. Vivien Rose and David Bailey ed, *European Union Law of Competition* (Ballamy & Child, 2014), 1242

<sup>234</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-06297, para 24

<sup>235</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-06297, para 31

<sup>236</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-06297, para 33

<sup>237</sup> Veljko Milutinović, 'The 'right to damages' under EU competition law: from *Courage v. Crehan* to the White Paper and beyond', (Wolters Kluwer, 2010), 172

<sup>238</sup> Article 12 (1) of the Directive

The Directive focuses more on the action for damages caused by a violation of Articles 101 and 102. The damage is indeed the most attractive remedial tool for the individual to bring action and discover the violation. But the Directive underlines simultaneously that *‘actions for damages are only one element of an effective system of private enforcement of infringements of competition law...’*.<sup>239</sup> Hence apart from the damage there are also injunction relief and the nullity of the agreement as well as restitution that can be used as a remedial tool by the individual in most of Member States.

In the first place, Article 101 provides its own civil consequence in the paragraph (2) that *‘any agreements or decisions by associations of undertakings prohibited under Article 101 (1) and cannot obtain the exemption under Article 101(3) shall be automatically void.’* The Court of Justice confirmed that *‘the nullity ... is absolute’*, which *‘has no effect as between the contracting parties and cannot be set up against third parties’*.<sup>240</sup> The rule of nullity *‘can be relied on by anyone’*.<sup>241</sup> Article 101(2) can be used by the claimant either as ‘sword’ or as ‘defense’ to terminate the invalid agreement.<sup>242</sup> For instance, a distributor who concluded a vertical agreement with their supplier can sue for nullity of the agreement so as to terminate the contractual relationship (offensive use of Article 101(2)). It is also possible for the distributor who failed to comply with the vertical agreement and was sued by the supplier to invoke nullity of the agreement as a defence (defensive use of Article 101(2)). Besides, the agreement which falls within Article 102 of the Treaty would be regarded as ‘invalid’ in a homogenous way, although the Union did not state so clearly.<sup>243</sup> It is possible, although not likely, that the person sues for nullity of the agreement for breach of Article 102.<sup>244</sup> The sanction of the nullity should be determined under national law, subject to the principles of effectiveness and equivalence.<sup>245</sup>

Secondly, if the agreement is invalid, the claimant is able to further claim for the return of unjust enrichment or restitution as a result of the agreement. For example, the distributor who failed to comply with the vertical agreement and paid the sanction to the supplier should be allowed to claim for the return of the sanction provided that the agreement is determined a nullity. Regrettably, the judgment of *Courage* did not indicate the right to restitution, although the damages claimed by *Crehan* were essentially compensatory restitutions.<sup>246</sup> The individual right to restitution is also governed by national law, subject to principles of effectiveness and equivalence.<sup>247</sup> For example, section 812 of the German Civil Code provides the rule governing the return of unjust enrichment if it resulted from a performance without valid legal foundation.<sup>248</sup>

Another significant type of private litigation is the litigation for injunctive relief which also exists in most of the national laws practiced in Member States. For example, German law allows

<sup>239</sup> Recital (5) of the Directive; some academics believed that ‘damages claims at their core are a matter for non-contractual obligations (or tortious obligation).

<sup>240</sup> Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, para 29

<sup>241</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, para 22

<sup>242</sup> Damien Geradin et al, *EU Competition Law and Economics*, (Oxford University Press, 2012), para 3.207

<sup>243</sup> Veljko Milutinović, *supra* n 237, 148-149;

<sup>244</sup> Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Maklu Publishers, 2013), 208

<sup>245</sup> In addition, the rule of nullity can also be found in the national law of some Member States. For example, the agreement which is breach of Articles 101 and 102 can also rely on the section 134 of the German Civil Code which provides *‘A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion’*.

<sup>246</sup> Gyselen opined that the claim of Mr *Crehan* is essentially a reimbursement of the price excess, which is a form of restitution on the tort liabilities. See Luc Gyselen, Comment from the point of view of EU competition law, in Wouters and Stuyck (Eds.), *Principles of proper conduct for supranational, state and private actors in the European Union: Towards a lus Commune*, Essays in honour of Walter van Gerven (Antwerpen/Groningen/Oxford, 2001), 139; See Assimakis P. Komninos, *supra* n 163, 461-462;

<sup>247</sup> See Magnus Strand, ‘Indirect purchasers, passing-on and the new Directive on competition law damages’, *European Competition Journal*, August 2014, 379; Simon Vande Walle, *supra* n 244, 210-211

<sup>248</sup> Section 812 of German Civil Code

an injunctive action to remove the existing infringement (*Beseitigung*) and an injunctive action to prevent a future infringement from happening (*Unterlassung*).<sup>249</sup> Section 33(1) of the Act Against Restraints of Competition (hereinafter, ARC) grants the individual the right to compensation and permanent injunctive relief due to the breach of Articles 101 and 102 and provisions of ARC.<sup>250</sup> English law allows a prohibitory injunction (to order the person not to commit into the conduct), a mandatory injunction (order the person to commit into the conduct) and a *quia timet* injunction (order the person not to commit to the conduct).<sup>251</sup> In reality, the injunctive relief can prevent an existing or future antitrust harm or danger and is usually easier to prove and obtain than compensatory damages.

The existing damages provided in the Directive are full compensatory damages which include repayment of the actual damages, loss of profit and interest. As regards the controversial punitive damages, the opinion of the Union appears to be changed. In *Manfredi*, the Court of Justice stated that if the punitive damages can be awarded to cases under national law, it should also be allowed in similar cases in terms of the rights granted by Articles 101 and 102 in light of the principle of equivalence.<sup>252</sup> However, a change occurred in the Directive which articulated that the punitive damages which may result in a risk of overcompensation should be prevented in Member States.<sup>253</sup> Predictably, punitive damages will be, without any doubt, more attractive for claimants than full compensation, provided that other circumstances are similar among Member States, which will naturally cause a forum shopping on the jurisdiction and have different consequences for the same action in different Member States.<sup>254</sup>

#### 4. Common rules in the Directive

##### a. Binding effect of the final decision made by national competition authorities

Uniform application of Community competition law between the Commission and national courts or NCA is not new in the EU competition law. Article 16 of Regulation 1/2003 ruled that national courts and NCA should avoid taking decisions which are running counter to the decisions of the Commission.<sup>255</sup> A national court is able to decide whether to stay its proceedings waiting for the decision of the Commission in order to achieve the uniform application of the Union's competition law. Under such circumstances, claimants do not need to establish the infringement in the follow-on action.

Prior to the Directive, there was no uniform rule on the binding effect of the final decision of the NCAs in different Member States. For instance, section 33(4) of German ARC, which is a relatively broad binding, provides that not only the decision made by the national public authorities, but also that made by public authorities or a court in other Member States is valid. Such a rule has incurred a lot of criticisms and doubts as to whether the German court should

<sup>249</sup> Simon Vande Walle, *supra* n 244, 204

<sup>250</sup> Section 33(1) of ARC

<sup>251</sup> Simon Vande Walle, *supra* n 244, 203

<sup>252</sup> Joint Cases C-295/04 to C-298/04, *Manfredi* [2006], ECR I-06619, para 93

<sup>253</sup> Article 3(2) of the Directive;

<sup>254</sup> See Magnus Strand, *supra* n 247, 378-379;

<sup>255</sup> Regulation 1/2003, Article 16; In the case *Masterfoods* (C-344/98, *Masterfoods and HB* [2000], ECR I-11369, para 48, 52), the Court of Justice stated that the decision of national courts on application of Articles 101 and 102 TFEU does not impose any binding effect on the Commission. The Commission is the one that can present an individual decision. The individual decision means that the Commission can adopt a decision on the same practice or agreement even if it results in conflicts with the decision which has already been made by national courts. Even though the court of first instance took a decision which is contrary to the subsequent decision of the Commission, the court of appeal should maintain a consistent decision with the Commission.

be bound by a decision of public authorities or courts in other Member States. Firstly, it implied that the German court should make sure whether a foreign public authority has recorded such a decision on the same issue, which may result in complications and disorders.<sup>256</sup> Secondly, some doubts that this broad binding rule without exceptions not being inconsistent with the right of defence under the ECHR and German Basic Law (Grundgesetz für die Bundesrepublik Deutschland) have been voiced.<sup>257</sup>

The Commission's Proposal established the binding of the decision from the national public authorities and the review courts by using the term '*cannot take decisions running counter to such finding of an infringement*'.<sup>258</sup> The Proposal did not mention the effect of decisions made by a foreign authority or court from another Member State. Doubts regarding the right of defence remained in the comments of the Proposal.<sup>259</sup> Even so, in a follow-on action, the burden of proof on the claimant would be largely lightened, if a national court can adopt the national authorities' final decision completely.<sup>260</sup> But this rule was not adopted in the final version of the Directive. It seems that the Directive aimed to establish a new sincere cooperation between NCA and national courts.<sup>261</sup> The Directive provided that national courts should deem their NCA's or national review court's final decision as '*irrefutably*' in the follow-on action.<sup>262</sup> In the context of cross-border cases, the final decision of foreign authorities or the foreign review court in one member state should be deemed '*prima facie* evidence' at least.<sup>263</sup>

A question regarding the probative value of the decision remains, namely what if the final decision is not the infringement decision but a decision that found the undertaking is innocent. In other words, for example, if the final decision of the Commission found that the offence does not exist, the issue is whether it implies that the private parties will be denied the action or are dealt a bad result from their litigation. It is clear that the final decision of the Commission is based on its investigation. It cannot preclude the probability that private parties will find new facts or evidences regarding the same behaviour, which has not been found by the Commission. Therefore, the right of individuals to sue should be ensured in any event.

## b. Disclosure of evidence

It is beyond doubt that the information asymmetry is a normal problem and a primary hindrance for litigants to prove their claims or defences in the antitrust damages action. Important

<sup>256</sup> See Georg M. Berrisch, and Markus Burianski, 'Kartellrechtliche Schadensersatzansprüche nach der 7. GWB – Novelle: Eine Einschätzung der Zukunft privater Kartellrechtsdurchsetzung mittels Schadensersatzklagen in Deutschland', *WuW* 9/2005, 883

<sup>257</sup> See Id, Georg M. Berrisch, Markus Burianski, *supra* n 256, 883. Other opposite opinions believed that this results in no problem on the protection of the fundamental rights under ECHR, because the public enforcement, subject to ECHR, is better on 'the procedural guarantee for the defendant' than the private litigation. This opinion can be found in Wouter P. J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', *World Competition* Volume 32 No. 1, March 2009, 20

<sup>258</sup> Article 9 of the Proposal for the Directive provided that '*Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.*'

<sup>259</sup> See Cristian Kersting, 'Die neue Richtlinie zur privaten Rechtsdurchsetzung in Kartellrecht', *WuW* 06/2014, 572; see Erika Rittenauer, and Katharina Bruckner, 'Sonderschadenersatzrecht für Kartellgeschädigte? Der Richtlinienvorschlag der Europäischen Kommission zu Schadenersatzklagen im Kartellrecht', *wbl* 28 (2014), 305

<sup>260</sup> See Anneli Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions', *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 6, 458.

<sup>261</sup> Directive, recital (34)

<sup>262</sup> Article 9 para 1 of the Directive

<sup>263</sup> Directive, Article 9 para 2, recital (35); This application of the binding effect should not prejudice to Article 267 of the Treaty on the preliminary ruling. The '*final infringement decision*' is interpreted as '*an infringement decision that cannot be, or that can no longer be, appealed by ordinary means*'.

evidence that litigants are asked to provide so as to support their claims or defence may be in the hands of claimants, defendants, third parties (including the Commission and national competition authorities). It cannot be denied that an effective mechanism on disclosure of evidence is imperative for antitrust action, especially for follow-on action. The Directive provides the general rules on access to file by private parties for the antitrust action, including Articles 5, 6, 7 and 8. Among them, Article 5 provides a basic rule for the disclosure. Articles 6 and 7 provide the rule concerning '*the disclosure of the evidence included in the file of a competition authority*' and the limited use of the file respectively. Article 8 sets the penalties of the disclosure.

#### **aa) Common rules of the disclosure of evidence (Article 5)**

The main goal addressed by the Directive is that the disclosure should be reasonable and proportionate, that it considers the interests of parties.<sup>264</sup> In order to ensure effective antitrust damages action, the litigants should have the opportunity to access the evidence under the control of other parties or the competition authorities, on the one hand. On the other hand, it should also pay attention to the extent to which the information has been accessed by litigants. The disclosure of evidence should neither impede the protection of business secrets or confidential information of the other party nor the effectiveness of public enforcement by the Commission and national competition authorities.<sup>265</sup> As regards the protection of the confidential information, the infringer cannot invoke the risk of damages action as a reason to refuse the disclosure.<sup>266</sup> The Directive aims to ensure a minimum level of the effective access to evidence, which presents a pre-condition that relevant items of evidence or categories of evidence should be disclosed only where the applicant '*has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant.*'<sup>267</sup> Specified items of evidence or relevant categories of evidence should be defined '*as precisely and as narrowly as possible*' subject to the principle of proportionality.<sup>268</sup> The request of the disclosure by litigants including the claimant and the defendant should thus satisfy the pre-condition.<sup>269</sup>

Before the national courts have made the decision regarding the disclosure of evidence, they should examine the evidence or facts which are submitted by claimants and assess that: (a) whether the present facts or evidence are sufficiently to justify a request to disclosure evidence; (b) whether the scope and cost of disclosure is proportionate, especially whether evidence under the disclosure request is relevant to the action and prevents the fishing expenditure; (c) whether there are arrangements or measures for the protection of the confidential information.<sup>270</sup>

Article 5, para 4 and 5 underlined the effective protection regarding the disclosure of the information including confidential information. Member states should ensure that 'national courts have at their disposal effective measures to protect such information'.<sup>271</sup> Para 6 and 7 of this Article laid down the rules concerning the protection of the right of the party as a respondent to the disclosure order to be heard before national courts and the protection of the legal professional privilege.<sup>272</sup>

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<sup>264</sup> Directive, Article 5 para 3; See Philip Bentley QC, David Henry, Antitrust damages actions: obtaining probative evidence in the hands of another party, (2014) 37 *World competition*, Issue 3, 272

<sup>265</sup> Directive, recital (18)

<sup>266</sup> Directive, Article 5(5)

<sup>267</sup> Directive, recital (16)

<sup>268</sup> Directive, recital (16)

<sup>269</sup> Directive, recital (16), Article 5(1), (2)

<sup>270</sup> Directive, Article 5(3)

<sup>271</sup> Directive, Article 5 (4)

<sup>272</sup> Directive, Article 5 (4)

## bb) Disclosure from the Commission and national competition authorities

The pre-condition of ‘*the plausible assertion*’ should also be applied in the disclosure of evidence from files of competition authorities, including files connected with the investigation and copies of documents concerning private parties in the hands of competition authorities.<sup>273</sup> In addition to the common rules mentioned above, Member States should also ensure that the national rules follow the specific provisions governing the disclosure of evidence from competition authorities according to Articles 6 and 7 of the Directive. The request may be presented to gain access to materials in files from the Commission or national competition authorities.

### (1) *Pfleiderer and Donau Chemie*

Both of the two cases are referred to in the dispute concerning the issue whether the claimant of an antitrust damages action has the right to obtain a full or partly access to the documents in connection with the national leniency program on the application of Article 101. Both of the two cases were brought due to the cartel infringement. In the case *Pfleiderer*, the claimant *Pfleiderer* asked for accessing all the files including the documents of the leniency program submitted by the applicants of the leniency.<sup>274</sup> The Court of Justice indicated that the Commission Notice on Leniency and Notice on the Co-operation between the Commission and the courts of the EU Member States have no binding effect on the national leniency program.<sup>275</sup> It is thus the duty of the national law to determine whether a person is allowed to access the files on national leniency procedures subject to the principles of effectiveness and equivalence.<sup>276</sup> Furthermore, the Court of Justice underlined the significance of the leniency program in the enforcement system of the EU competition law and went on to address that permission of disclosure of the decisive documents to the party in antitrust damages action would be detrimental to the effectiveness of the leniency program.<sup>277</sup> Therefore, the Court of Justice set down a weighing exercise which should be launched by national courts on the access requests filed by the victims of antitrust infringement.<sup>278</sup>

In the subsequent case *Donau Chemie and Others*<sup>279</sup>, the Court of Justice repeated that the national courts should ‘*weigh up the respective interests in favour of disclosure of the*

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<sup>273</sup> Without the ‘*the plausible assertion*’ brought by claimants, it would lead to risk of the illegal investigation or disclosure on the information of the party. See Philip Bentley QC, and David Henry, *supra* n 264, 279; See Christian Kersting, ‘Perspektiven der privaten Rechtsdurchsetzung im Kartellrecht’, *ZWeR* 3/2008, 257

<sup>274</sup> Case C-360/09, *Pfleiderer* [2011], ECR I-05161, para 12

<sup>275</sup> Case C-360/09, *Pfleiderer* [2011], ECR I-05161, para 21

<sup>276</sup> Case C-360/09, *Pfleiderer* [2011], ECR I-05161, paras 23-24; See Ingrid Vandenborre and Thorsten Goetz, ‘EU Competition Law Procedural Issues’, *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 6, 507

<sup>277</sup> Case C-360/09, *Pfleiderer* [2011], I-05161, paras 26-27

<sup>278</sup> The Court of Justice concluded that ‘*the provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.*’

<sup>279</sup> Case C-536/11, *Donau Chemie and Others* [2013], ECLI:EU:C:2013:366. The main dispute in this case is brought by an association named VDMT (Verband Druck & Medientechnik) that requested to access to materials related to a former judicial proceeding between the competition authorities in Austrian (Bundeswettbewerbsbehörde) and several cartel members. VDMT subsequently intended to bring an antitrust damages action subsequently. However, according to Austrian law, the disclosure must be agreed with the consent of all parties in the proceeding, including the defendant. The question for a preliminary ruling is that whether EU law, especially the principles of

information and in favour of the protection of that information.’<sup>280</sup> The Court of Justice did not indicate that which documents can be disclosed and which cannot. It reaffirmed that the ‘weighing exercise’ should be launched ‘on a case-by-case basis’ in ‘the national legal context’.<sup>281</sup> The national courts should weigh up all the elements regarding private and public interest so as to decide whether or not to disclose and the extent or scope of the disclosure.<sup>282</sup> It only stressed that the significance of the legal protection of the individual right should be considered in the course of the ‘weighing exercise’, because ‘taking account of the fact that access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation’.<sup>283</sup> Therefore, the Court of Justice pointed out that EU law precludes a national rule which ‘systematically refused’ to grant the right to access the documents on the sole ground that the party in the proceeding does not agree with it ‘without leaving any possibility for national courts of weighing up the interests involved’.<sup>284</sup>

## (2) CDC and EnBW

It should be noted that both of the cases *Pfleiderer* and *Donau Chemie* were brought before national courts relying on the national leniency program concerning the application of European competition law and pursuing the access to files in the hands of national competition authorities. The other two important cases *CDC*<sup>285</sup> and *EnBW*<sup>286</sup> were based on disclosure requests of the documents held by the Commission by the injured persons of the cartels that intended to bring a follow-on damages action against cartelists. One of significant differences in *Pfleiderer* and *Donau Chemie* is the application of the Transparency Regulation on the access to file of the European institution including the Commission, European Parliament and Council as regards these two cases. The private parties can obtain access to the file of the Commission according to the Transparency Regulation (Regulation 1049/2001) which governs the access to files of EU institutions by EU citizens and residents (or non-EU citizens or residents), subject to Article 255 of the EC Treaty.<sup>287</sup> The Transparency Regulation aims to ‘ensure the widest possible access to documents’ held by the institution.<sup>288</sup> The exceptions of the disclosure laid down in Article 4, which provides in No. 2 that access to files should be refused by the institution as considering the protection of ‘commercial interests’, ‘court proceedings and legal advice’, ‘the purpose of inspections, investigations and audits’, unless ‘an overriding public interest’ can be found in the disclosure.<sup>289</sup>

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effectiveness and equivalence precludes this Austrian law which does not allow the court to conduct the case-by-case weighing exercise on the disclosure.

<sup>280</sup> Case C-536/11, *Donau Chemie and Others* [2013], ECLI:EU:C:2013:366, paras 30-31

<sup>281</sup> Case C-536/11, *Donau Chemie and Others* [2013], ECLI:EU:C:2013:366, paras 37-45

<sup>282</sup> Case C-536/11, *Donau Chemie and Others* [2013], paras 37-45; see Ingrid Vandenborre and Thorsten Goetz, *supra* n 276, 506

<sup>283</sup> Case C-536/11, *Donau Chemie and Others* [2013], para 39; see Nicholas Hirst, *Donau Chemie: National Rules Impeding Access to Antitrust Files Liable to Breach EU law*, *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 6, 485

<sup>284</sup> Case C-536/11, *Donau Chemie and Others* [2013], para 43. In addition, it can be found that from the Opinion of AG Mr Jääskinen, he stressed that the significance of the disclosure of file on the legal protection of individual right is bigger than that on the enforcement of a public policy.

<sup>285</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, ECLI:EU:T:2011:752

<sup>286</sup> Case T-344/08, *EnBW Energie Baden-Württemberg v Commission* [2012], ECLI:EU:T:2012:242; Case T-356/12 *P. Commission v EnBW* [2014], ECLI:EU:C:2014:112

<sup>287</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, the Council and Commission documents. The persons whose resident is not in the member states can also be granted by institutions (including the European Parliament, the Council and Commission) a right to access to documents under certain conditions. The Regulation set down the conditions (exception) that the documents should not be disclosed including the possibilities to undermine the public or private interests, or the proceedings of the institutions.

<sup>288</sup> Recital (4), Article 1 of the Transparency Regulation

<sup>289</sup> Article 4 of the Transparency Regulation

In *CDC*, the victim CDC Hydrogen Peroxide applied for access to the case-file of the hydrogen peroxide decision (the ‘statement of contents’), which was refused by the Commission according to the first and third indent of Article 4 No.2 of the Transparency Regulation.<sup>290</sup> Instead, the Commission offered the applicant CDC a non-confidential version of the statement of contents.<sup>291</sup> The General Court in its judgment analysed the application of the exceptions governed in the first and third indent of Article 4 No.2 and the applicant CDC’s right to access to file, especially the relationship between the leniency and private damages action. First of all, the Commission argued that the disclosure of the files in connection with the commercial interests will increase the risk of subsequent damages action which will place the co-operated undertakings in a worse position in the civil action and further deter them from co-operating.<sup>292</sup> The General Court denied this argument by stating that ‘*avoiding such (damages) action cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection*’, since any person has the right to pursue their damages due to the breach of European competition law.<sup>293</sup> Moreover, the Commission contested that it is better to adopt a broad interpretation of ‘*purpose of investigation*’ prescribed in the third indent of Article 4 No.2 so as to prevent undermining the competition policy including leniency. It went on to state that the would-be leniency applicants should not be deterred from co-operating with the Commission because of the disclosure.<sup>294</sup> The General Court indicated that this broad interpretation is “*incompatible with the principle that ..., set out in recital 4, namely, ‘to give the fullest possible effect to the right of public access to documents’, the exceptions...must be interpreted and applied strictly*”.<sup>295</sup> Furthermore, this broad interpretation will result in a different treatment regarding the exceptions between the European competition policy and other policies.<sup>296</sup> In addition, the General Court highlighted that the private damages action as well as the leniency are the significant tools for ensuring compliance with the competition law, which also needs to be protected.<sup>297</sup>

In the case *EnBW*, the applicant EnBW Energie Baden-Württemberg AG filed a claim before the General Court after it was rejected by the Commission regarding access to the file of the Case COMP/F/38.899.<sup>298</sup> The General Court annulled the Commission’s rejection decision in 2012. In 2014, the Court of Justice annulled again the judgment of the General Court. The General Court reconfirmed its CDC decision in its judgment that the exceptions in Article 4(2) of the Transparency Regulation should ‘*be interpreted and applied strictly*’.<sup>299</sup> However, the Commission appealed before the Court of Justice by arguing that the interpretation of the exceptions should be harmonized with disclosure rules in Regulations 1/2003 and 773/2004 concerning the access to the file of the proceeding under Article 101 TFEU and therefore ‘*the implementation of the law and the undertakings related*’ should be protected from the disclosure.<sup>300</sup> Articles 27(2) and 28 of Regulation No 1/2003 and Articles 6, 8, 15 and 16 of Regulation No 773/2004 award the ‘*parties concerned*’ and the complainants the opportunities to access to the file. Other third parties of the administrative proceeding can only rely on the

<sup>290</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, ECLI:EU:T:2011:752, para 9

<sup>291</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 9

<sup>292</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 47

<sup>293</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 49

<sup>294</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, paras 69 and 71

<sup>295</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 71; The General Court defined the ‘*purpose of investigation*’ as ‘*to determine whether an infringement of Article 81 EC or Article 82 EC has taken place and to penalise the companies responsible*’ (para 59). The General Court further stated that ‘*the investigation in a given case must be regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts, because it is at that moment that the institution in question itself considers that the procedure has been completed*’ (para 62).

<sup>296</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 72

<sup>297</sup> Case T-437/08, *CDC Hydrogene Peroxide v Commission* [2011], ECR II-08251, para 77

<sup>298</sup> Case T-344/08, *EnBW Energie Baden-Württemberg v Commission* [2012], ECLI:EU:T:2012:242, para 3

<sup>299</sup> Case T-344/08, *EnBW Energie Baden-Württemberg v Commission* [2012], paras 41, 54, 126

<sup>300</sup> Case T-344/08, *EnBW Energie Baden-Württemberg v Commission* [2012], paras 35 and 36; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O J L 123/18, Articles 6(1), 8, 15, 16;

Regulation 1049/2001 to submit a disclosure request. The Court of Justice indicated that provisions in Regulations 1/2003 and 773/2004 concerning access to file by parties within the investigation would be undermined where these parties are refused by the two above Regulations, while the third parties outside the investigation are allowed to access to the same file.<sup>301</sup> Therefore, there is a need for ensuring a coherent application of the Regulations 1/2003, 773/2004 and 1049/2001 and the Regulation 1049/2001 does not have the primacy over the other two Regulations. The Court of Justice affirmed the Commission's argument by indicating that *'the Commission is entitled to presume, ..., that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding'*.<sup>302</sup> Under the general presumption, a specific document that is not covered by the presumption or an overriding public interest existent in the disclosure could still be discovered.<sup>303</sup> On the primacy of the private damages action and the protection of the leniency document, the General Court underlined the significance of the damages action for the effectiveness of the European competition policy. But the Court of Justice addressed that protection of the right to compensation does not mean that all the documents need to be discovered.<sup>304</sup> It followed that both the significance of the disclosure or protection of the document should be weighed up before allowing or rejecting the disclosure request.<sup>305</sup> Moreover, the Court of Justice went on to state that the right to compensation did not constitute an overriding public interest prescribed in Article 4(2) of the Transparency Regulation, which should be allowed with access to the file.<sup>306</sup>

In sum, the Court of Justice adopted a different point of view than the General Court by strengthening the Commission's discretion regarding the disclosure. Some comments expressing doubts that it will increase the difficulties for the parties to request access to a document from the Commission.<sup>307</sup> In the light of the present decision of the Court of Justice, the Commission can refuse the disclosure request by using a general presumption. The applicants of the disclosure without the knowledge of the content of documents can hardly show whether the document is not covered by the presumption or whether there is an overriding public interest in the disclosure request (since the right to compensation cannot justify such a public interest).

### **(3) Disclosure of the file in the Directive**

Article 6 of the Directive provides the disclosure rules of the file held by the competition authorities particularly. First of all, Article 6 paragraph 2 of the Directive provides that the Transparency Regulation has priority on this issue referred to the disclosure of the document of the Commission.<sup>308</sup> It should be noted that the Transparency Regulation is not binding in respect of the disclosure of the documents held by national authorities.

Secondly, national courts should evaluate whether the disclosure is consistent with the principle of proportionality in light of Article 5(3) of the Directive before an order of the disclosure will

<sup>301</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, paras 88-90

<sup>302</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, para 94

<sup>303</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, para 100

<sup>304</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, para 106

<sup>305</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, para 107

<sup>306</sup> Case T-356/12 P, *Commission v EnBW* [2014], ECLI:EU:C:2014:112, para 108

<sup>307</sup> See Bruno Lebrun and Laure Bersou, '*Commission v EnBW Energie: Non-Disclosure of Leniency Documents*', *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 7, 463; see Philip Bentley QC, and David Henry, *supra* n 264, 276-277;

<sup>308</sup> Article 6 (3) of the Directive provided that *'this Article is without prejudice to that rules and practices on public access to documents under Regulation (EC) No 1049/2001.'* In addition, the file which was drawn up by the institutions mentioned above, but in the possession of a member state should also fall into the Regulation according to Article 5 of the Regulation No 1049/2001.

be made. In order to ensure the proportionality principle, national courts should further assess whether the request is in connection with ‘*the nature, subject-matter or contents of documents*’, whether it is connected with the damages action and whether the effectiveness of the public enforcement can be ensured.<sup>309</sup>

The Directive promotes a total ban on the disclosure of leniency statements and settlement submissions, which means that the national courts should not be allowed to order to a disclosure of this information at any time in order to safeguard an effective leniency program.<sup>310</sup> The information should be (i) deemed to be inadmissible; or (ii) protected under the full effect of the limits in Article 6 of the Directive.<sup>311</sup> However, a national court can on the request of the claimant examine the evidence above in order to establish whether they satisfy to the definition of the leniency statements and settlement submissions pursuant to Article 2 (16) and (18).<sup>312</sup> This total ban virtually denies the weighing up exercise submitted by the Court of Justice in *Pfleiderer* and subsequent case-law on leniency statements and settlement submissions.

A temporary ban can be imposed on the information related to the administrative investigation in the course of the public enforcement proceedings including: (a) *the one prepared by a natural or legal person specifically for the proceedings of a competition authority*; (b) *the one that the competition authority has drawn up and sent to the parties in the course of its proceedings*; (c) *settlement submissions that have been withdrawn*.<sup>313</sup> This information can only be used after the public enforcement proceeding has finished. If not, these categories of evidence are either deemed as inadmissible or under the protection laid down in Article 6.<sup>314</sup>

As regards other evidence which is not mentioned above, including all the ‘*pre-existing information*’, the national courts are able to order disclosure at any time, subject to the proportionate standard.<sup>315</sup> It implies that the national court will examine firstly whether the requested document is covered by the total or the temporary ban and if it is not, the assessment of the proportionality principle will be adopted.

#### **(4) Penalties**

Penalties which may consist of ‘*the possibility to draw adverse inferences*’ in the litigation and ‘*the possibility to order the payment of costs*’ can be imposed by national courts following the value is ‘*effective, proportionate and dissuasive*’.<sup>316</sup> National courts can impose penalties on parties, third parties and their legal representatives, where: ‘(a) *their failure or refusal to comply with the disclosure order of any national court*; (b) *their destruction of relevant evidence*; (c) *their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information*; (d) *their breach of the limits on the use of evidence*’.<sup>317</sup>

#### **(5) Diversities of the disclosure among Member States**

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<sup>309</sup> Article 6 (4) of the Directive

<sup>310</sup> Article 6 para 6 of the Directive;

<sup>311</sup> Article 7 para 1 of the Directive.

<sup>312</sup> Article 6 para 7 of the Directive

<sup>313</sup> Article 6 para 5 of the Directive; See Anneli Howard, *supra* n 260, 457; see Erika Rittenauer and Katharina Brückner, *supra* n 259, 301-310.

<sup>314</sup> Article 7 para 2 of the Directive.

<sup>315</sup> Article 6 para 8 and 9, Article 7 para 3 of the Directive; See Anneli Howard, *supra* n 260, 461; See Ingrid Vandenborre, and Thorsten Goetz, *supra* n 276, 508

<sup>316</sup> Article 8 of the Directive; See Erika Rittenauer, and Katharina Brückner, *supra* n 259, 304.

<sup>317</sup> Article 8 (1) of the Directive

A notable point is that there are dramatic distinctions regarding the disclosure provisions in civil procedure between the Member States of the common law (such as England, Ireland) and the Member States of the civil law (such as Germany). For example, a ‘*standard disclosure*’ is governed by Part 31 of the English Civil Procedure Rules, including a pre-trial disclosure and disclosure throughout the proceeding (Part 31.16, 31.11). The party relying on public interest would be undermined by the disclosure applicable to the court to ‘*permit him to withhold the disclosure of the documents*’.<sup>318</sup> A settled case is *National Grid*, in which several French undertakings that were requested to disclose documents held by them to the English court alleged that such disclosure will violate the French Blocking Statue and result in a risk of the criminal sanction.<sup>319</sup> In this case, the Court of Appeal found that the English court had the discretion to order a disclosure of the evidence.<sup>320</sup> In the judgment of the High Court, it was concluded that the disclosure which complies with private enforcement of Articles 101 and 102 is inconceivable for bringing a criminal proceeding.<sup>321</sup>

In contrast, there is no pre-trial disclosure in the German civil litigation. The only possible route for parties to request evidence held by the opponents is Sections 421, 428 of German Code of Civil Procedure (CCP, Zivilprozessordnung), which provides that the court can rely on the petition of parties to ‘*direct the opponent to produce records or documents*’.<sup>322</sup> Section 428 governs the petition to records or documents held by third parties.<sup>323</sup> In addition, the German court can request the parties to produce the evidence according to Section 142 of CCP.<sup>324</sup> Moreover, the document held by the Federal Cartel Office (Bundeskartellamt, FCO) can be requested by the victims of disclosure under section 406e Abs.1 of the German Code of Criminal Procedure (Strafprozeßordnung, StPO) and section 46 of the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten, OWiG).

In the two years following adoption of the Directive, a minimum harmonization between the different jurisdictions governing the antitrust litigation is least possible outcome. The disclosure rules of the Directive will be transferred to national law, notably provisions of the total ban, a temporary ban and the principle of proportionality. However, one distinction remains in which the national courts of different Member States are likely to adopt different attitudes regarding the scrutiny of the disclosure request. It is partly due to a different inherent logic of the burden of production of evidence between the adversary and the inquisitorial systems.<sup>325</sup> Member States of the continental system that order the party to offer the evidences in connection with personal claims usually only permit a limited disclosure regime and will enact a strict scrutiny on the disclosure request, compared with common law states.<sup>326</sup> However, it should be noted that a harmonized disclosure rule among Member States is desirable to ensure the legal certainty and predictability of the leniency program, which will not deter the infringer from cooperating with the Commission and national competition authorities.

## (6) Analysis

<sup>318</sup> Part 31.19 of the English Civil Procedure Rules

<sup>319</sup> Secretary of State for Health and others v Servier Laboratories Ltd and others and National Grid Electricity Transmission plc v ABB Limited and others, [2013] EWCA Civ 1234, judgment of 22 October 2013

<sup>320</sup> See National Grid, *supra* n 319, para 102

<sup>321</sup> See National Grid, *supra* n 319, para 45; National Grid Electricity Transmission Plc and Others, [2013] EWHC 822 (Ch), paras 46-47

<sup>322</sup> Section 421 of CCP

<sup>323</sup> Section 428 of CCP

<sup>324</sup> Section 142 of CCP

<sup>325</sup> Andreas Heinemann, Access to Evidence and Presumptions – Communicating Vessels in Procedural Law, (Springer-Verlag Berlin Heidelberg, 2014), 167-168, 177-178

<sup>326</sup> See Anneli Howard, ‘Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive’, *Journal of European Competition Law & Practice* (2015), 259

Roughly summing up the foregoing discussion, it can be found that two important routes are available for injured persons intending to bring a follow-on antitrust action to access to and gather evidence from the public proceeding. Firstly, the complainants have the right to propose a direct request to the Commission for the access to the files under Regulations 1/2003 and 773/2004, on the one hand, and the injured persons other than the complainants can propose the request to the Commission according to the Transparency Regulation. Moreover, the alternative route is that the injured persons request the disclosure of evidence held by the Commission and national competition authorities through the follow-on antitrust action under the scrutiny of the national courts according to national law (that is consistent with the provisions of the Directive). In light of the foregoing discussion, two crucial problems regarding the existing disclosure rules in the Directive and national law can be addressed; they are: the relation between the right to access to the file (private antitrust action and the protection of the information on the ground of business confidentiality and public enforcement; the harmonization of application of disclosure rules in different Member States, in particular regarding the effectiveness of the leniency.

Commentators doubted that the total ban which is laid down in Article 6 paragraph 6 on the leniency statement and settlement submission is inconsistent with the interpretation of the principle of effectiveness by the Court of Justice.<sup>327</sup> In the light of *Pfleiderer* and *Donau Chemie*, the Court of Justice explained repeatedly in the judgment that national courts need to ‘weighing up’ all the interests of parties is a necessary step to ensure the principle of effectiveness in absence of EU rules governing the matter.<sup>328</sup> It added to state that leniency applicants may procure profit from the decision made by a national court to refuse the party access to some documents, because it generates the opportunity for them to ‘circumvent their obligation to compensate for the harm’.<sup>329</sup> The refusal should thus be made due to ‘overriding reasons relating to the protection of the interest...’<sup>330</sup> Therefore the question can be concluded as to whether this absolute prohibition will preclude the ‘weighing up exercise’ under the discretion of the national courts. Or in other words, this inconsistency with the primary law principle of effectiveness will hinder the legislators of member states to introduce this ‘rigid per se protection’ from the Directive.<sup>331</sup>

It seems that there is a small distinction between the stressed points held by the Court of Justice and the legislators of the Directive. It is obvious that the Court of Justice attached more importance to the ‘weighing up exercise’ which may be partly depended on the discretion of the national courts, whereas the Directive valued the legal certainty and the applicability of the national rules on this matter rather than the others.<sup>332</sup> Although the Advocate General Mr Jääskinen mentioned in his Opinion that ‘access by third parties to voluntary self-incriminating statements made by a leniency applicant should not in principle be granted’,<sup>333</sup> he held that it is because the public policy reasons and fairness of the leniency regime weigh heavily against the interests of private litigants to access to the evidence.<sup>334</sup>

<sup>327</sup> See Christian Kersting, ‘Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants’, *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 1, 3

<sup>328</sup> Case C-360/09, *Pfleiderer* [2011], ECR I-05161, para32; Case C-536/11, *Donau Chemie and Others* [2013], para49.

<sup>329</sup> Case C-536/11, *Donau Chemie and Others* [2013], para47

<sup>330</sup> Case C-536/11, *Donau Chemie and Others* [2013], para47

<sup>331</sup> See Christian Kersting, *supra* n 327, 3.

<sup>332</sup> An example of the distinctions in applying the ‘weighing exercise’ by different national courts has already been found in Germany and UK. Unlike the refusal to disclose the leniency material of the case *Pfleiderer* held by the Amtsgericht Bonn in Germany, the UK court allowed access in the case *National Grid*. (*National Grid Electricity Transmission Plc v. ABB Ltd and others*, [2012] EWHC 869 (Ch)). Also See Philip Bentley QC, David Henry, *supra* n 264, 273

<sup>333</sup> Case C-536/11, *Donau Chemie and Others* [2013], (AG Opinion), para55

<sup>334</sup> Case C-536/11, *Donau Chemie and Others* [2013], (AG Opinion), para56

In addition, national courts are able to apply the ‘*weighing up exercise*’ of the proportionality principle on other evidence other than the one totally or temporarily protected. The EU legislators indicated in the Directive that member states can still maintain or introduce a wider standard on the disclosure of evidence, only if it does not undermine the paras 4 and 7 of Articles 5 and 6.<sup>335</sup>

### c. Limitation period

Article 10 of the Directive guided the national rules on the limitation periods for the antitrust damages action, which requested the national rules to determine the beginning and duration of the limitation period and Paragraph 3 of Article 10 addressed that the limitation periods of the antitrust damages action should not be less than five years.<sup>336</sup> A longer period set out by national rules is also welcomed. Besides, national rules should ensure the limitation period begins after the infringement has ceased and after the claimant knows or can be reasonably expected to know about the facts including: (i) the behaviour and the fact of the infringement; (ii) the harm sustained by him; (iii) the infringer under paragraph 2 of Article 10.<sup>337</sup> If the public authority is launching a public investigation or proceeding on the infringement of the competition law, it should lead to a discontinuation (be suspended or interrupted) of the limitation period until the public proceeding has closed.<sup>338</sup>

### d. Joint and several liability

Article 11 of the Directive provided rules that address the joint and several liability and the recovery of the contribution between the infringers.<sup>339</sup> It set out the basic rules that undertakings that were engaged in the joint behaviour should bear a joint and several liability which requests each of them to accepting the liability to full compensation for the loss caused by this behaviour.<sup>340</sup> In parallel, victims can ask for the full compensation from any of the infringers.<sup>341</sup> As regards the recovery of the contribution among the infringers, paragraph 5 provided that an infringer can claim the recovery of the contribution from any other infringer with the amount that exceeded their responsibilities on the violation of the competition law.<sup>342</sup>

Besides, Article 11 privilege the small or medium-sized enterprise (SME) and the immunity recipients<sup>343</sup> the derogation on their liability to full compensation. The SME has the privileges to only compensate its own direct and indirect purchasers following the pre-conditions: *(a) the right of full compensation; (b) less than 5% of the market share at any time during the infringement of competition law; (c) if the SME did not acquire the privileges on the compensation, its economic viability will be irretrievably jeopardised and its assets will lose all the value.*<sup>344</sup> In paragraph 3 of Article 11, the prohibition of the derogation would occur, if

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<sup>335</sup> Article 6 para 8 of the Directive.

<sup>336</sup> Article 10 para 3 of the Directive.

<sup>337</sup> Article 10 para 2 of the Directive.

<sup>338</sup> Article 10 para 4 of the Directive.

<sup>339</sup> Article 11 of the Directive

<sup>340</sup> Article 11 para 1 of the Directive.

<sup>341</sup> Article 11 para 1 of the Directive.

<sup>342</sup> Article 11 para 5 of the Directive.

<sup>343</sup> Article 2 para (19) of the Directive provided that ‘immunity recipient means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency program.’

<sup>344</sup> Article 11 para 2 of the Directive; Article 2 of the Commission Recommendation 2003/361/EC provided that ‘1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. 2. Within the SME category, a small enterprise is defined as an enterprise which

the SME played a key role in the infringement (as the leader) or it was not the first time for it to commit into an infringement of the competition law.<sup>345</sup>

Paragraph 4-6 of Article 11 provided the privilege of immunity recipients to be liable for their own direct or indirect purchasers (or providers), as well as other injured parties that cannot obtain a full compensation from the other infringers.<sup>346</sup> In addition, immunity recipients only burden the amount of the contribution in connection with the harm of their own purchasers as a result of its own infringement.<sup>347</sup> However, concerning the question which parties are liable to prove the fact that the injured person cannot obtain a full compensation from other infringers, the Directive did not provide a detailed provision requesting Member States to find an answer in their national law.<sup>348</sup> In addition, it seems that the privileges of immunity recipients can be a deterrence not only against the injured person, but also the other infringers. Some commentators questioned that whether the immunity recipients are inappropriately protected by the Directive, although it aimed to ensure the public policy effectively.<sup>349</sup>

## **5. Analysis of the right to full compensation in Community antitrust damages actions**

### **a. Direct and indirect purchasers**

#### **aa) Definition**

Paragraph (23) and (24) of Article 2 provided the definition of direct and indirect purchasers as follows:

*“‘direct purchaser’ means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;”*

*“‘indirect purchaser’ means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.”*

The Directive described direct purchasers as the direct customers of infringers, who may suffer the loss as a result of the breach of Articles 101 and 102 TFEU directly. The rights granted to direct purchasers are also applied to direct suppliers of infringers, who are able to bring an antitrust action in a homogenous way under the relevant national law.<sup>350</sup> The standing awarded to direct purchasers is imperative for safeguarding an effective private antitrust action, especially for the hard-core cartel, in which they are the major force in regards to pursuing damages because competitors are reluctant to sue when they may not usually suffer a loss.<sup>351</sup>

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*employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. 3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.’*

<sup>345</sup> Article 11 para 3 of the Directive.

<sup>346</sup> Article 11 para 4 of the Directive.

<sup>347</sup> Article 11 para 5 of the Directive.

<sup>348</sup> See Christian Kersting, *supra* n 327, 2-5; See Christian Kersting, *supra* n 259, 564-575.

<sup>349</sup> See Christian Kersting, *supra* n 327, 2-5; See Christian Kersting, *supra* n 259, 564-575

<sup>350</sup> Article 12 para 4 of the Directive.

<sup>351</sup> Friedrich Wenzel Bulst, Schadensersatzansprüche der Marktgegenseite im Kartellrecht: Zur Schadensabwälzung

As regards indirect purchasers, the problem is complicated because it is difficult to know whether or not they actually suffered the harm, namely the questionable existence of the overcharge derived from the illegal agreement or practice. Firstly, the uncertainty exists because whether the overcharge has been passed on to customers may depend on many factors and issues, such as the intensity of the market competition, the demand elasticity, which will be discussed in detail below. It should be noted that an undertaking may (or may not) choose different commercial or financial measures to offset illegal overcharges rather than merely pass it on downstream.<sup>352</sup> Secondly, due to the remoteness of the harm, indirect purchasers' injury are hard to be proved and calculated. When indirect purchasers obtained the opportunity to access court, the next problem is to remove or eliminate the obstacles in the national procedure to facilitate indirect purchasers to bring an action, which is the major goal of the White Paper and the subsequent Directive.<sup>353</sup>

Because of the remoteness of harm and uncertainty regarding the existence of passing-on overcharges, it cannot be overlooked that the potential risk of overcompensation and under-compensation in the action is inconsistent with the major principle of full compensation.<sup>354</sup> On the one hand, for the propose of improving the under-compensation, which widely resides in most Member States, a large scale of potential victims is allowed to pursue and reap damages under the case law of the Court of Justice (e.g. *Courage, Manfredi*), as well as under the provisions of the Directive. On the other hand, Article 12(2) of the Directive stated that ‘*in order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level*’.<sup>355</sup>

Article 12 (1) of the Directive underlined that the right to full compensation should be enjoyed by injured persons no matter whether they are direct or indirect purchasers.<sup>356</sup> It followed that the Directive allowed the application of passing-on defence both in offensive and defensive ways in the context of full compensation, which implied that not only the defendant can bring a passing-on defence against direct purchasers, who have probably passed their overcharges on to the next level of the distribution chain; but also the indirect purchasers are able to invoke it as the major evidence in regards to them suffering damages due to this agreement or practice.<sup>357</sup>

## bb) Infringement and causation

As discussed above, it is likely that direct and indirect purchasers relying on Articles 101 and 102 file a claim before national courts, which may imply two types of proceedings: the

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nach deutschem, europäischem und US-amerikanischem Recht, (Nomos C.H. Beck, 2006), 235-236

<sup>352</sup> In the early case *Comateb*, the Court of Justice mentioned that ‘various factors’ in commercial transaction should be taken into account, when an overcharge derived from an illegal charge has been transferred on downstream. It further addressed that undertakings that have borne the overcharges may probably adopt other commercial methods to offset this undue cost instead of raising prices. Therefore, it cannot be presumed with certainty that the illegal charge has been passed on without assessing the individual case. Joined cases C-192/95 to C-218/95, *Comateb and Others v Directeur général des douanes et droits indirects* [1997], ECR I-00165, para 25

<sup>353</sup> White paper, 1.1; para (4) of the Directive

<sup>354</sup> Article 3 of the Directive; See Jonathan Sinclair, ‘Damages in Private Antitrust Actions in Europe’, *Loyola Consumer Law Review*, 2002, Volume 14 Issue 4, 554

<sup>355</sup> Article 12 (2) of the Directive

<sup>356</sup> The Supreme Court of America banned the application of the passing-on defence in offensive and defensive ways respectively in the famous case law *Hanover Shoe* (*Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392 U.S. 481 (1968)) and *Illinois Brick* (431 U.S. 720 (1977)), which rejected the right to compensation of indirect purchasers, although a part of states overruled this case law by the legislation.

<sup>357</sup> Article 12-14 of the Directive

contractual and tortious proceedings. The Directive does not provide any rules on the proving the infringement of Articles 101 and 102 that can be relied upon by the purchasers. Virtually, both direct and indirect purchasers are capable of being harmed by the restrictive collusion of Article 101 and the abusive behaviour of Article 102. As regards the infringement of Article 102, the abusive behaviour of predation, for example, will sometimes also result in an overcharge in their price (supra-competitive price) or a decreased quality of the product or service, which will be discussed in the next part in detail.

Regulation 1/2003 established a decentralized enforcement system of EU competition law, which provides that the national courts have the competence to apply Article 101(1) and (3) directly.<sup>358</sup> Article 101(2) provides that any restrictive agreement which falls within Article 101(1) and cannot be exempted by Article 101(3) will be null and void. It implies that, first of all, the injured purchasers can claim the nullity of the agreement relying on Article 101(1) and (2) before national courts, irrespective of claiming damages or not. The defendant can invoke a defence based on Article 101(3) to seek an exemption on his agreement.

Furthermore, in addition to the nullity of the agreement, the injured purchasers are also likely to claim for damages resulted from the breach of Article 101(1). The case *Courage* was just one based on the vertical agreement that violated Article 85 (now Article 101) of the Treaty to claim for damages brought by Crehan (actually a counterclaim against the original claim by *Courage*).<sup>359</sup> Proving the agreement which falls within Article 101(1) is the first step of the damages action. The related rules of evidence are governed by national law.

In *Manfredi*, the Court of Justice confirmed a causal relationship between the infringement of Article 81 EC and the harm could be deemed the premise for the individual to bring an antitrust claim before national courts in the non-contractual proceeding.<sup>360</sup> In *Manfredi*, the Court of Justice went on to state that the exercise of the individual right to sue, such as the application of the concept ‘causal relationship’, is the competence of the member states.<sup>361</sup> According to *Ashurst Report*, some Member States, such as the UK and Austria (7 -9 Member States totally), request a direct causation to be proved by the claimant.<sup>362</sup> Other Member States do not request the direct causation in particular.<sup>363</sup>

In practice, injured persons have the relatively huge difficulty to prove the causal link between the infringement and the damages, partly as a result of the information asymmetry, although the disclosure of key documents from other litigants and public authorities is allowed in the action according to the Directive.<sup>364</sup> The traditional tort law requests that the claimants should be able to prove that their damages are not caused by factors which are not the practice of the defendants, (which can be named as a ‘*but-for test*’ in English law).<sup>365</sup> For instance, the injured persons who claim they suffered an illegal overcharge on them must prove that this overcharge is resulted from the anti-competitive practice of the defendants.

<sup>358</sup> Regulation 1/2003, recital (4), Article 6

<sup>359</sup> See Bernard Crehan and Intrepreneur Pub Company CPC, [2004] EWCA Civ 637, para 39; Case C-453/99, *Courage and Crehan* [2001] ECR I-06297, para 6

<sup>360</sup> Joint Cases C-295/04 to C-298/04, *Manfredi* [2006], ECR I-06619, para 61-63, ‘especially para 63 indicated that ‘...any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm’; See Magnus Strand, *supra* n 247, 374;

<sup>361</sup> Joint Cases C-295/04 to C-298/04, *Manfredi* [2006], ECR I-06619, para 64; however, the Court of Justice did not in the subsequent case show that which concrete extent should the national law to adopt in applying these principles on the assessment of the causation. See Magnus Strand, *supra* n 247, 374; Vivien Rose and David Bailey ed, *supra* n 233, 1248

<sup>362</sup> *Ashurst Report*, 50-51

<sup>363</sup> See *Ashurst Report*, 50-51

<sup>364</sup> See Hanns A. Abele, Georg E. Kodek and Guido K. Schaefer, ‘Proving causation in private antitrust cases’, *Journal of Competition Law & Economics*, 7(4), 851

<sup>365</sup> See Hanns A. Abele, Georg E. Kodek and Guido K. Schaefer, *supra* n 364, 854; Vivien Rose and David Bailey ed, *supra* n 233, 1248

It should be noted that in some member states, there is a relatively high standard of proof on the causation is the rule. For example, in the English precedent, a '*predominant cause*' of damages sustained by the claimant was requested by the High Court.<sup>366</sup> A similar high request on the standard of proof on causation can also be found in Germany.<sup>367</sup> For indirect purchasers, it can be inferred that the difficulty of proving one's case may be larger because they are usually in a remote position from the illegal practice.

As mentioned above, in the follow-on action, the Directive extended that the national courts should value the final decision of their NCA or by their review court as the irrefutable evidence for the infringement of competition law.<sup>368</sup> As regards the cross-border circumstance, the final decision from the NCA in one Member State should be deemed at least as '*prima facie evidence*' in national courts of other Member States so as to prove that there is indeed an agreement or conduct that violated the competition law.<sup>369</sup> The Directive did not provide any detailed provisions on the burden of proof of infringement by the claimant in a stand-alone action, which probably means they should prove all the elements of the infringement under the national law.<sup>370</sup>

### cc) Fault

The Directive did not mention whether the fault should be a necessary element in the proving approach in the antitrust action (as tortious actions), whereas the earlier White Paper suggested that '*Member States take diverse approaches concerning the requirement of fault to obtain damages*'.<sup>371</sup> It should be noted that most of the undertakings committing an infringement of Articles 101 and 102 have the intent to do so and aimed to pursue a supra-competitive price. However, it cannot be denied that there could be individual cases without a fault and as a result of a genuinely excusable error which cannot be aware of by the rational person, even in a high standard of care.<sup>372</sup> The White Paper gave advice that Member States could lay down measures of the shifting the burden of proof onto the fault, which asked the defendant to prove that a genuinely excusable error existed.<sup>373</sup> In sum, the issue of fault is still part of the duty of member states and national law.<sup>374</sup>

According to the *Ashurst Report*, fault (intent or negligence) is required in non-contractual proceedings in most of Member States.<sup>375</sup> In some of Member States, such as Germany and Austria, the fault is technically a requirement.<sup>376</sup> But there is a rebuttable presumption, so that the defendant needs to rebut it provided the infringement has already been established by the claimant.<sup>377</sup> Other Member States, such as France, Belgium and the Netherlands, as long as the

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<sup>366</sup> *Arkin v Borchard Lines* [2003] EWHC 687 (Comm), [2003] 2 Lloyd's Rep 225, para 536; Vivien Rose and David Bailey ed, *supra* n 233, 1248

<sup>367</sup> In the case *Wegfall der Freistellung*, the claim was dismissed because the supply chain was not in the target geographical market, which can be an example of the high standard of proof on causation under German law. *Wegfall der Freistellung*, judgment of the Bundesgerichtshof of 30 March 2004, WuW/E DE-R 1263. Vivien Rose and David Bailey ed, *supra* n 233, 1248;

<sup>368</sup> Article 9 para 1 of the Directive; See Anneli Howard, *supra* 260, 456

<sup>369</sup> Article 9 para 2 of the Directive

<sup>370</sup> See Anneli Howard, *supra* n 260, 456;

<sup>371</sup> White paper, 2.4

<sup>372</sup> White paper, 2.4

<sup>373</sup> White paper, 2.4

<sup>374</sup> Vivien Rose and David Bailey ed, *supra* n 233, 1224

<sup>375</sup> *Ashurst Report*, 50-51

<sup>376</sup> *Ashurst Report*, 50-51

<sup>377</sup> *Ashurst Report*, 50-51

infringement has been shown by the claimant, it will automatically imply that the fault has been fulfilled as long as the infringement has been shown by the claimant.<sup>378</sup>

## **dd) Damages**

### **(1) Types of damages suffered by direct and indirect purchasers**

As mentioned above, the Directive confirmed in Article 3 that ‘*it shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest*’.<sup>379</sup> For instance, a direct purchaser who bought a product from an infringer may suffer an initial overcharge. If this product is for their commercial activities or is resold directly downstream, this direct purchaser may choose to pass on the initial overcharge to the next level of the distribution chain (or not), which is named as ‘*passing-on overcharge*’ borne by the indirect purchasers.

The actual or direct loss (*damnum emergens*) suffered by purchasers (or suppliers) is virtually this undue overcharge caused by the inflated price due to the breach of Articles 101 and 102 in practice.<sup>380</sup> This inflated price could occur under a cartel case which artificially fixed a supra-competitive price or quota on a certain product, or restricted other competition conditions by means of a horizontal agreement or concerted practice. It may also appear in a joint venture and the excessive price practice. In addition, if the undertaking with dominant position committed to an exclusionary practice, such as exclusionary dealing or margin squeeze, it will lead to a reduced market share of competitors in the market, or even foreclose them from the market. Under such circumstance, customers of these competitors have to pay a higher price for the product compared to before, which is also overcharge damage.

Besides, there is also potential loss of profit as a result of the decreased volume because of a rise in price, which is called ‘*volume effect*’.<sup>381</sup> The loss may appear, regardless of whether they passed on the overcharge.

The suppliers to the market may be confronted with the similar problem, i.e. they suffered the harm because infringers as their customers artificially drove the price down, which can be named ‘undercharge’.<sup>382</sup> There is no big difference between the harm suffered by suppliers and that suffered by the purchasers, or the way in which they enjoyed their rights to sue.<sup>383</sup>

### **(2) Burden of proof on damages**

#### **aaa) Presumption on the harm caused by cartel**

The Directive provided that a cartel infringement should be presumed to cause harm, unless the defendant is able to rebut this presumption.<sup>384</sup> Such a presumption automatically extends to

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<sup>378</sup> Ashurst Report, 50-51

<sup>379</sup> Article 3(2) of the Directive

<sup>380</sup> The overcharge is defined in Article 2(20) of the Directive as ‘*the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law*’.

<sup>381</sup> Vivien Rose and David Bailey ed, *supra* n 233, 1257.

<sup>382</sup> Friedrich Wenzel Bulst, *supra* n 351, 265

<sup>383</sup> Friedrich Wenzel Bulst, *supra* n 351, 265

<sup>384</sup> Article 17 para 2 of the Directive; See Anneli Howard, *supra* n 260, 456

cover the causal link between the cartel and damages.<sup>385</sup> The statistics in a study on *Quantifying Antitrust Damages* could be a ground for the reasonability of this presumption, which indicates that since 1960s approximately 93% of the cartels have lead to an overcharge.<sup>386</sup>

It is true for the claimants lightening their burden of proof because the cartel members may possess most of the key evidence related to the existence of harm, even the amount of harm.<sup>387</sup> The onus of proof on other harm resulting from other infringement is still governed in national law, subject to the principles of effectiveness and equivalence.<sup>388</sup> It implies that the burden of proof on the harm and the standard of proof governed by national rules should not lead to the exercise of rights granted by the Community law which is practically impossible or excessively difficult.

### **bbb) Presumption on the passing-on overcharge**

As mentioned above, the Directive permits the passing-on to be used as a ‘*shield*’ and ‘*sword*’ by the infringers and indirect purchasers. Chapter IV provides the basic provisions as to the application of the passing-on overcharges in connection with the safeguard of full compensation. Article 13 allowed the infringers to invoke a passing-on defence against direct purchasers in order to prevent the overcompensation for them. Article 14 governs that indirect purchasers can invoke the existence of the passing-on overcharges as the probative evidence or fact of their damages.

At a first glance, the defendant who invokes the passing-on defence against direct purchasers should undertake the burden of proof under reasonable disclosure from the claimant or from third parties so as to prove the fact that the illegal overcharge has already been passed on wholly or partly to the next level in the distribution chain.<sup>389</sup>

At a second glance, the national court can presume that the passing-on overcharge has been proved if the indirect purchasers can prove that: (a) *the defendant has committed an infringement of competition law*; (b) *the infringement of competition law has resulted in an overcharge for direct purchaser of defendant*; (c) *the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.*<sup>390</sup> Pursuant to Article 17(2), the overcharge sustained by direct purchasers laid down in (b) due to the cartel infringement does not need to be proved.<sup>391</sup> Article 14 also provides that infringers can rebut this presumption if the court can credibly satisfy their demonstration regarding the existence or the amount of the passing-on overcharge.<sup>392</sup>

### **(3) Damages calculation**

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<sup>385</sup> See Peter Stauber, Hanno Schaper, ‘Die Kartellschadensersatzrichtlinie – Handlungsbedarf für den deutschen Gesetzgeber?’, *NZKart* 9/2014, 351

<sup>386</sup> The statistics are from different types of cartels occurred in different industries of Europe, US, Canada and other countries. Study prepared for the Commission ‘Quantifying antitrust damages’ (2009), 88-97, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf); Practical guide on quantifying harm, para 142-144; Andrew Macnab ed, Bellamy & Child Oxford, 2014, 273

<sup>387</sup> See Erika Rittenauer and Katharina Brückner, *supra* n 259, 309; See Anneli Howard, *supra* n 260, 458

<sup>388</sup> See Erika Rittenauer and Katharina Brückner, *supra* n 259, 309.

<sup>389</sup> Directive, Article 13

<sup>390</sup> Directive, Article 14 (2)

<sup>391</sup> Directive, Article 14 (2), 17(2); See Magnus Strand, *supra* n 247, 382

<sup>392</sup> Directive, Article 14 (2)

### **aaa) Communication and Practical guide on quantifying harm**

In 2003, the Commission adopted a *Communication on Quantifying Harm* and a detailed *Practical Guide* which provide the basic methods and techniques for individuals or national courts so as to facilitate calculation approaches in antitrust damages action.<sup>393</sup> As mentioned above, the right to full compensation implies that the claimant is able to pursue the damages including actual loss, loss of profit and interest.<sup>394</sup> In addition, the full compensation aimed to place victims in a position they would be in, provided the illegal agreement or practice had not occurred,<sup>395</sup> thereby the basic method to quantify the damages is to compare the actual position of victims with the position they would be in without the infringement.<sup>396</sup> In other words, a non-infringement scenario (or counterfactual scenario) should be established for the comparison.<sup>397</sup> This scenario provides that the comparator could be selected in the same market or a different but similar geographic or product market. From the same market presents a scenario that could be established before and/or after the effect of the violation has taken hold. If that is impossible, a scenario selected from a different but similar geographic or product market can also be helpful. Different methods have their own characters, requirements, advantages and disadvantages, which may be selected mainly due to different data available.<sup>398</sup> Besides, the Practical Guide provides other methods as alternatives, i.e. simulation models, cost-based and finance-based methods, and the imperative techniques for the data statistics, such as regression analysis.

### **bbb) Calculations of the overcharge**

*The Practical Guide* provides two approaches for indirect purchasers or infringers to apply so as the calculation of the passed-on overcharge. For indirect purchasers, the quantification could be based on the existence of the initial overcharge and the passing-on rate on his level of the distribution chain. Or as an alternative, it could be determined by price difference between the actual price and the non-infringement price sustained by indirect purchasers, which is the calculation of the rise of price due to the infringement.

### **ccc) Calculation of damages due to exclusionary practices**

When competitors have been excluded from the market, two types of potential damages may be the result of exclusionary practices.<sup>399</sup> One of damages is customers of foreclosed

<sup>393</sup> The calculation of damages in antitrust damages action should be governed by the national law, subject to principles of effectiveness and equivalence, including the issues on the standard of proof, the degree of precision of the amount, the burden of proof and etc. *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, 2013/C 167/07; *Commission staff working document practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, {C(2013) 3440}.

<sup>394</sup> Directive, recital (12) provides that interest should be calculated 'from the harm occurred to the compensation paid'.

<sup>395</sup> *Communication on quantifying harm*, para 6; *Practical guide on quantifying harm*, para 1

<sup>396</sup> An exact and precise estimation on damages is almost impossible, because the market conditions or information without the infringement is based on the hypothetical assessment, which cannot be determined for sure. A lot of factors like price, sales volumes, and profit margins in a hypothetical market are difficult to assess. So the major goal pursued by the guide is an approximated estimation.

<sup>397</sup> *Practical guide on quantifying harm*, para 11-12

<sup>398</sup> *Practical guide on quantifying harm*, para 40 and 21; the Practical guide focuses on two main and general categories of damages as a result of a breach of Community competition law: (i) an illegal overcharge caused by cartel or exploitative abuses; (ii) damages as a result of exclusionary practice suffered by competitors and customers. The latter describing damages suffered by competitors due to the exclusionary practice will be discussed in the part bb). In this part, the overcharge suffered by the purchasers (and suppliers) will be discussed, as well as a brief discussion of the underlying damages suffered by purchasers due to the exclusionary practice.

<sup>399</sup> The Practical guide on quantifying harm indicates that concrete exclusionary practices consist of predation,

competitors turning to purchase products or services from infringers that hold the dominant position in the market that may charge a higher price.<sup>400</sup> The other damage may occur when infringers have successfully achieved their goals by practicing price predation, to obtain a higher market share or to exclude their competitors from the market, they may recoup their price to a high level, which may be higher than the competitive price, to offset costs invested into the predation.<sup>401</sup> Moreover, in some cases, infringers may maintain a competitive price at reduced quality of products or services, or decreased input in the innovation, which will ultimately affect customers' benefit.<sup>402</sup> The approaches to quantifying these damages are no different from the approaches to the overcharge discussed above.<sup>403</sup>

## **b. Competitors and new entrants**

### **aa) Overview**

There is no doubt that competitors should be awarded with the right to damages due to a breach of Articles 101 and 102, in the light of *Courage* and *Manfredi*. The Directive attached obviously more importance to the damages caused by the cartel or vertical restraints rather than by the exclusionary practice. The literatures likewise focus more on the damages caused to direct and indirect purchasers in the vertical distribution chain than on the damages sustained by competitors and new entrants. Only the *Practical Guide on Quantifying Harm* provides the potential types of damages suffered by competitors and the methods to calculate them.<sup>404</sup>

The possibilities of competitors and new entrants being damaged because of the cartel or vertical agreement under Article 101 cannot be precluded. But in most cases, they suffered damages due to the exclusionary practices, such as predation, or refusal to supply, under Article 102, where the dominant undertaking adopts the exclusionary practice intending to restrict or reduce the market share of competitors, or even intending to exclude their competitors from the market, or where the undertaking adopts the practice aiming to prevent new entrants from entering the market and from committing the related commercial activities.<sup>405</sup> Apart from the exclusionary practice, Article 102 also includes an exploitative practice in its paragraph(a), i.e. '*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.*' Unfair prices or other trading conditions will normally harm purchasers and consumers; they are usually deemed to be adjustable through the competitive force.<sup>406</sup>

The major objective of Article 102 TFEU is focused on the prevention of behaviours which may be detrimental to an effective competition structure rather than protect the interest of individuals, such as consumers or competitors directly.<sup>407</sup> However, it does not mean that

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exclusive dealing, refusal to supply, tying, bundling and margin squeeze.

<sup>400</sup> The Practical guide on quantifying harm, para 214

<sup>401</sup> The Practical guide on quantifying harm, para 210-211

<sup>402</sup> The Practical guide on quantifying harm, para 213

<sup>403</sup> The Practical guide on quantifying harm, para 212

<sup>404</sup> The Practical guide on quantifying harm, part 4

<sup>405</sup> Vivien Rose and David Bailey ed, *supra* n 233, 1240

<sup>406</sup> Hedvig K. S. Schmidt, 'Private Enforcement – Is Article 82 EC special?', in: Mackenrodt, M. –O./ Conde Gallego, B./ Enchelmaier, S. (Eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer Berlin Heidelberg, 2008, 151

<sup>407</sup> Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331, para 106; Wolfgang Wurmnest, in: Mackenrodt, M. –O./ Conde Gallego, B./ Enchelmaier, S. (Eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer Berlin Heidelberg, 2008, 9-10

Article 102 does not seek to protect individual rights.<sup>408</sup> Protection of the interest of competitors and consumers does not essentially oppose protection of competition structure. The argument contested that the harm to competitors is not always compatible with the harm to the competition. The motive of competitors to bring an antitrust claim may differ from that of the purchasers, which does not accord with the cost-benefit analysis, because even an unfounded claim could have some deterrence effect on the undertakings.<sup>409</sup> Therefore, the private litigation could be used as a competitive strategy by undertakings against their competitors.

Exclusionary practices may include predation, exclusive dealing, rebate, tying, bundling or margin squeeze.<sup>410</sup> Normally, exclusionary practice can be divided into three phases, which may be important.<sup>411</sup> It is necessary and helpful to determine the three periods not only for the assessment of the foreclosure effect or proving of the causal link, but also for the quantification of damages thereafter. Taking the predation as an example, first of all, during the *attrition phase*, the dominant undertaking adopts an exclusionary practice, such as cutting the price, and increasing the relevant investment to ensure the effectiveness of the practice.<sup>412</sup> At the same time, competitors in the market may likewise increase input to defend any foreclosure effects. Then it enters into a *recoupment phase*, in which objectives of the foreclosure have been achieved so that the dominant undertaking obtains the market share he wants.<sup>413</sup> Finally, in a *growth phase*, the foreclosure ends with the market re-entry of the competitors into the market or the restoration of the market share.<sup>414</sup> However, the determination of the periods of the practice is invariably difficult.<sup>415</sup> For instance, the emergence of the foreclosure effect could not be exactly accompanied with the initiation of the practice, or the practice could be terminated long before the end of the foreclosure effect. In addition, different types of practices may cause different durations of foreclosure, which may depend on the characteristics of the practice and the commercial strategies adopted by undertakings.<sup>416</sup>

## **bb) Infringement and the causation**

The follow-on action could be easier for injured persons, because of the binding effect of the decision by the Commission and the NCA. Proving the causal link between the practice and the damages should be the first step for injured persons.<sup>417</sup> Thereafter they need to consider the quantification of damages. Proving causality could be established by means of the assessment as to whether the practice imposed effects on the victim's market, which resulted in the victim's damages. In effect, the victim's damages may derive from the exclusionary practice, in part or as a whole. It is therefore vital for claimants and the courts to determine which part of the damages is the result of the exclusionary practice.<sup>418</sup>

<sup>408</sup> Mark-Oliver Mackenrodt, 'The Reform of Article 82 EC in the light of the "Economic Approach"', in: Mackenrodt, M. –O./ Conde Gallego, B./ Enchelmaier, S. (Eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer Berlin Heidelberg, 2008, 168-169

<sup>409</sup> Mark-Oliver Mackenrodt, *supra* n 408, 170-171

<sup>410</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (bellowed referred as Guidance paper on Article 82), OJ C 45, 24.2.2009, para7, 32-90; Practical Guide on quantifying harm, para 180

<sup>411</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *Damages for exclusionary practice a primer*, in I. Kokkoris and F. Etro (eds), *Competition Law and the Enforcement of Art. 102*, Oxford: Oxford University Press, 209-210

<sup>412</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 209-210

<sup>413</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 209-210

<sup>414</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 209-210

<sup>415</sup> Practical guide on quantifying harm, para 185-187; Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 209-210

<sup>416</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 209-210;

<sup>417</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 219; Vivien Rose and David Bailey ed, *supra* n 233, 1248-1249;

<sup>418</sup> See Luigi Prosperetti, *Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national courts' experience* (February 2009). Available at SSRN

In the stand-alone action, the problem could be more complicated. *The Guidance Paper on Article 82* adopted a more economic-based approach in Article 82, which may be a useful reference for national courts.<sup>419</sup> There are a minimum of three steps as three pre-conditions of Article 102.<sup>420</sup> The first step is to define the relevant market, which could be difficult but significant for claimants who rely on a breach of Article 102 to bring an action. Secondly, it should be established that the company has a dominant position in the relevant market. Thirdly, claimants need to show the defendant's behaviour pertaining to the abusive behaviour.

The definition of the relevant market is of significance; it aims to '*identify all actual competitors of the undertaking concerned that are capable of constraining its behaviour.*'<sup>421</sup> In the relevant product market, it is vital to define whether the product or service is interchangeable and substitutable on account of its price, characteristics and utility.<sup>422</sup> Generally, the assessment of the relevant product market focuses on the demand-side substitution and supply-side substitution.<sup>423</sup> The demand-side and supply-side substitution analyses whether similar or homogenous products or brands of products are available for consumers or suppliers to choose from as a substitute in the market. In addition, the potential competition, which views whether the potential undertakings could enter the market in the longer run or by means of the investment, could be launched at a subsequent stage of the assessment of the relevant product market.<sup>424</sup> The evidences related stem probably from the analysis via HMT (the hypothetical monopolist test)<sup>425</sup>, the critical loss analysis<sup>426</sup>, the statistical analysis<sup>427</sup>, questionnaires and surveys, company documents and others.<sup>428</sup> In addition, evidence related to the definition of the geographic market derive from historical records about the switching to new products, preference of consumers, entry barriers, the cost of transportation and others.<sup>429</sup>

The next step is to determine whether the undertaking, committing into the exclusionary practice under Article 102, is a dominant undertaking, or in other words, has a '*substantial market power*'.<sup>430</sup> Firstly, the market share is an imperative element in the assessment of the

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<http://ssrn.com/abstract=1551276> or <http://dx.doi.org/10.2139/ssrn.1551276>, 4.

<sup>419</sup> In this part, we discuss the problems in the context of the single dominance, that only one undertaking held the dominant position, rather than the collective dominance (more than one undertakings held the position). *Guidance Paper on Article 82*, para4; 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: Mackenrodt, M. – O./ Conde Gallego, B./ Enchelmaier, S. (Eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer Berlin Heidelberg, 2008, 132

<sup>420</sup> Hedvig K. S. Schmidt, *supra* n 406, 146

<sup>421</sup> Hedvig K. S. Schmidt, *supra* n 406, 147

<sup>422</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), para4; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, para 4.14

<sup>423</sup> Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, para 4.14

<sup>424</sup> Commission Notice on the definition of relevant market, para 24; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, paras 4.21, 4.23; the methods on defining the relevant market, such as SSNIP ('small but significant and non-transitory increase in price'), may probably need the assistance of the analysis by the experts or professional institutions.

<sup>425</sup> The methods on defining the relevant market, such as SSNIP ('small but significant and non-transitory increase in price') under the HMT, may probably need the assistance of the analysis by the experts or professional institutions.

<sup>426</sup> The critical loss analysis can be deemed a complementary method for the SSNIP to estimate the demand-side substitution, which assumes that a hypothetical monopolist intends to exercise a SSNIP and can also obtain profits from it, although he may suffer loss due to the decreased quantities. The maximum of the lost quantities is a critical loss, which can be an indicator for an undertaking intending to raise the price. If the actual lost quantities due to the actual rise of prices are lower than the critical loss, the undertaking would raise the price because it is profitable. Therefore, this market belongs to the relevant market.

<sup>427</sup> The statistical analysis focuses on whether the rise of prices on a product outside the market would influence the target product. If it does, this product should belong to the relevant market of the target product.

<sup>428</sup> Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, paras 4.31-4.41

<sup>429</sup> Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, paras 4.31-4.41

<sup>430</sup> Commission Notice on the definition of relevant market, para 24; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *supra* n 242, paras 4.21, 4.23; the methods on defining the relevant market, such as SSNIP ('small but significant and non-transitory increase in price'), may probably need the assistance of the analysis by the experts or

dominance. The evidences could come from the dominant undertaking, the third parties (such as customers, suppliers or trade associations), experts, professional institutions and others. The threshold for dominance is not less than 40% over a long period of time in the relevant market, as indicated in the Guidance Paper.<sup>431</sup> Secondly, the attention should be paid to ‘*the potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant*’.<sup>432</sup> The existence of barriers, such as sunk costs, legal barriers to entry, economies of scale, network effects, technological lead and vertical integration of an ‘*essential facility*’, should be taken into account.<sup>433</sup> The third element is buyer bargaining power, which focuses on the vertical relationship in the market, namely ‘*whether the size or commercial significance of the customer is big enough to deter the abusive practice, whether the customer is able to turn to a substitution, whether the customer is able to support a new entry or produce the target product itself without large sunk cost*’.<sup>434</sup>

In some cases, the dominant position could be easier to gauge and assess for competitors, with a large amount of accessible evidence and market data. More often, the assessment of the dominant position cannot live without the analysis or study by experts or a professional institution. In addition, the disclosure of the necessary information from infringers and third parties is imperative for the alleviation of the burden of proof by claimants.<sup>435</sup>

The third step is to prove the behaviour of the defendant pertaining to the abusive behaviour according to Article 102. The claimant does not only need to prove that the defendant committed into the illegal behaviour, but also that this behavior has ‘*actual or potential anticompetitive effects*’.<sup>436</sup> As regards the standard of proof concerning the ‘*anticompetitive effect*’, the Court of the First Instance indicated in the case *British Airways* that ‘*it is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or in other words, that the conduct is capable of having, or likely to have such an effect,*’<sup>437</sup> which implies that the likelihood or a future risk of the foreclosure suffices for the anticompetitive effect.<sup>438</sup>

The causation issue should still be governed by the national law, subject to principles of effectiveness and equivalence according to *Manfredi*.<sup>439</sup> It may be more difficult for competitors to establish a causal link between violation and damages because of the complexity of Article 82 and the lack of a special provision on this issue which could lighten the burden of the competitors, (just like the rebuttable presumption of the passing-on overcharge).<sup>440</sup>

## cc) Damages

### (1) Damages suffered by competitors

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professional institutions.

<sup>431</sup> Guidance Paper on Article 82, para 14

<sup>432</sup> Guidance Paper on Article 82, para 16; the expansion or entry should be able to deter the rise of price by the undertaking likely, timely and sufficiently. The entry or expansion is ‘*likely profitable for competitors or new entrants*’, ‘*swift to deter or defect the exercise of the substantial market power*’, ‘*is a considerable magnitude so as to deter any rise of price, not a small-scale entry*’.

<sup>433</sup> Hedvig K. S. Schmidt, *supra* n 406, 149

<sup>434</sup> Guidance Paper on Article 82, para 16

<sup>435</sup> Hedvig K. S. Schmidt, *supra* n 406, 148

<sup>436</sup> Hedvig K. S. Schmidt, *supra* n 406, 152

<sup>437</sup> Case T-219/99, *British Airways v Commission* [2003] ECR II-5917, para 293

<sup>438</sup> Hedvig K. S. Schmidt, *supra* n 406, 153

<sup>439</sup> Joint Cases C-295 and 298/04, *Manfredi* [2006] ECR I-6619, para 64

<sup>440</sup> Hedvig K. S. Schmidt, *supra* n 406, 153

First of all, competitors under the foreclosure effect of the abusive practice may suffer loss of profit (*lucrum cessans*) due to a declined market share, as the reduced quantify (they sell less) and increased costs (they buy more expensive input). This loss will occur until their market share has been restored to its original status, which is summarized in the Practical Guide.<sup>441</sup> The basic method of quantifying the loss of profit suffered by competitors is to establish a non-infringement scenario as a comparator and then to compare the profit in the non-infringement scenario with the actual profit of competitors caused by the violation.<sup>442</sup> Likewise, the comparison can be made according to the available data on the same market before and/or after the effects of the violation have made themselves felt, or on the similar but different geographic/product market, as mentioned above.<sup>443</sup>

A difficulty arises as to quantifying. Because the exclusionary practice generally changed the market structure, it is not easy to restore the non-infringement scenario exactly.<sup>444</sup> The estimation of the position of the competitor under the non-infringement scenario could contain the estimation regarding the competitors' future development, which is almost impossible to do because of the complexity of the structural change.<sup>445</sup> The Practical Guide provides that the non-infringement scenario can be established through a comparison with the position of a similar undertaking in the same market and same period without the impact of the foreclosure.<sup>446</sup> Other product or geographic market could also be deemed as a comparator for the estimation.<sup>447</sup>

Future loss may occur where the re-entry into the market or regaining the market share by competitors could be impossible or relatively difficult.<sup>448</sup> The amount of the future loss partially depends on the duration of the effects of the practice and the competitors' prospective profit, which might not be easy to determine.<sup>449</sup> As regards the duration of the foreclosure, it could cease with the foreclosure disappearing and the competitors re-entering the market, or when the competitors restore the regular commercial activities. Besides, a sunk cost of the injured competitors as a defensive strategy to react to the exclusionary practice may occur. This sunk cost pertaining to the actual loss should also be allowed in the light of full compensation.

## **(2) Damages suffered by new entrants**

For the new entrants, the sunk cost for entry into the market and future profit was confirmed in the *Practical Guide*. More often proving of the sunk cost is easier for claimant than the future profit because of the lack of the pre-infringement and post-infringement data (such as revenues, costs) for a new entrant. Reference can be made to an undertaking in a similar but different geographic or product market.<sup>450</sup> The *Practical Guide* suggests that concerning this uncertainty of the future loss, it is better for national law to establish pragmatic rules as to the recovery on a case- by –case basis.<sup>451</sup>

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<sup>441</sup> Practical Guide on quantifying harm, para 184

<sup>442</sup> Practical Guide on quantifying harm, para 183

<sup>443</sup> Practical Guide on quantifying harm, para 188-189; the Practical guide on quantify harm provides two possible approaches to calculate the loss of profit: (a) the lost profit can be calculated by the lost revenues minus the sunk costs due to the increased investment against the violation; (b) it can be sound, under some special circumstance, to use the average profit margin per unit to multiply by the actual number of units has been lost.

<sup>444</sup> Practical Guide on quantifying harm, para 183

<sup>445</sup> Practical Guide on quantifying harm, para 193

<sup>446</sup> Practical Guide on quantifying harm, para 194

<sup>447</sup> Practical Guide on quantifying harm, para 199

<sup>448</sup> Practical Guide on quantifying harm, para 206; Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 208-209

<sup>449</sup> Practical Guide on quantifying harm, para 207

<sup>450</sup> Practical Guide on quantifying harm, para 207

<sup>451</sup> Practical Guide on quantifying harm, para 207

### (3) Damages suffered by customers

At the outset of the exercise of the abusive practice, customers may probably reap the benefit, for instance, enjoying a relatively lower price than ever before. But this benefit will disappear under the abusive practice in the long run because once the dominant undertaking achieved its expected market share a recoupment of the price will occur in most cases. Even though the price is maintained at a competitive level after the recoupment, the dominant undertaking would offset its investment in the abusive practice by means of reduced quality of the product or service, which would likewise cause damages to customers.

The customers of the dominant undertaking suffer an overcharge due to the recoupment of the price, which can be calculated by comparing the suffering to an overcharge due to the recoupment of the price, which can be calculated by comparing the actual price to the price under the non-infringement scenario, as discussed above.<sup>452</sup> In addition, the customers of the injured competitors have to switch to purchase products or services from the dominant undertaking, and would probably also sustain an overcharge on the price because of the recoupment, as well as a customer switching costs.<sup>453</sup>

Furthermore, the exclusionary practice may result in harming on suppliers, as well as producers of the complementary product due to the lost quantities; they should be awarded with the right to full compensation.<sup>454</sup>

#### c. Umbrella customers

The claimant ÖBB-Infrastruktur AG is a subsidiary of the Austrian Federal Railway brought an antitrust damages action, which suffered a higher price due to the ‘*umbrella effect*’ caused by the elevator cartel.<sup>455</sup> Pursuant to Austrian law that the claimant in a damages action for a non-contractual obligation is requested to establish ‘*an adequate causal link*’ and ‘*a link of unlawfulness*’, damages resulted from the ‘*umbrella effect*’ of the cartel cannot being deemed to have an adequate causal link with the cartel, which forms the ‘*indirect loss*’.<sup>456</sup> The dispute in this case is whether or not customers of non-cartelists have the right to claim damages due to the umbrella effect under Article 101 precluding categorically the liability of cartelists on the rise of price due to the umbrella effect of the cartel.<sup>457</sup>

At the outset, the Court of Justice reiterated the conclusions achieved in *Courage* and *Manfredi*, that is, any individual who relies on the breach of Articles 101 and 102 have rights to pursue a damages claim for their loss.<sup>458</sup> The full effectiveness of Article 101 should be ensured by the national legislation, not only by means of public enforcement, but also through civil action pursuing the compensation for loss by injured persons.<sup>459</sup>

In *Manfredi*, the Court indicated that factors, such as *the application of the concept of the ‘causal relationship’*, are governed by the national law, subject to the principles of effectiveness

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<sup>452</sup> Practical Guide on quantifying harm, para 214;

<sup>453</sup> Practical Guide on quantifying harm, paras 213-214;

<sup>454</sup> Chiara Fumagalli, Jorge Padilla and Michele Polo, *supra* n 411, 210-213;

<sup>455</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317, paras 2, 10.

<sup>456</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, para 14.

<sup>457</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, paras 17, 19.

<sup>458</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, paras 21-23.

<sup>459</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, paras 21-23.

and equivalence.<sup>460</sup> In subsequent *Kone*, the Court of Justice went on to state that two pre-conditions are necessary for the establishment of the causal link. The first is, '*the cartel is in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently*'.<sup>461</sup> The second is that '*those circumstances and specific aspects could not be ignored by the members of that cartel*'.<sup>462</sup>

Concerning the first pre-condition, it is practically not difficult to prove that a cartel has caused the umbrella prices in the market.<sup>463</sup> Taking the elevator cartel as an example, the biggest objective of the elevator producers to commit into the cartel is to fix their prices at a supra-competitive level and to limit the quantities. Under this, price and quantities not just the cartelists, but also non-cartelists can enjoy the effect of the cartel gaining some opportunities to adjust their prices, irrespectively of acting as a responder to the increased demand for their products as a substitution or as a price taker (competitive infringe), regardless of '*knowing or unknowing*' of the existence of the cartel by non-cartelists.<sup>464</sup> This effect of the cartel on non-cartelists, which is referred to as '*umbrella effect*', will be appeared in general.

One may wonder whether it implied that the second pre-condition intended to establish that cartelists could reasonably foresee the likelihood of the umbrella effect under some certain circumstance.<sup>465</sup> AG Kokott seems to be of the opinion that there exists a strong non-rebuttable presumption on the foreseeability exists, by indicating that '*there is sufficient support for the assumption of a direct causal link if the cartel was at least a contributory cause of the umbrella pricing*'.<sup>466</sup> Even if a non-cartelist made the decision absolutely by himself without any concern to the cartel, the umbrella effect could also appear because this decision depended largely on the increased price.

In the market, for the purpose of fixing the price, cartelists are generally undertakings with dominant market power, whereas non-cartelist are usually small competitors (competitive infringe) that usually have no effect on the market price. One possibility is that the adjustment of the price by non-cartelists could be an independent decision that was made on an occasion at which non-cartelists were not aware of the existence of the cartel. The rise of the price could happen due to the increased demand diverting by the cartelists or other commercial or market factors. In addition, another possibility could occur where cartelists provided the non-cartelist with the information of the cartel via email or other manners. It may lead to a more complicated situation as to detecting whether or not this non-cartelist is innocent.<sup>467</sup> Although a strong non-rebuttable presumption on causal link indicated by AG Kokott exists, it seems that the Court of Justice maintained a cautious attitude on the issue of the right to damages in the judgment.<sup>468</sup> Therefore, the judgment just went on to conclude in the end that '*Article 101 should be interpreted as meaning that national rules should not categorically exclude the civil liability of undertaking in connection with the loss due to umbrella effect*'.<sup>469</sup>

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<sup>460</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, para 24. The judgment from the Court of Justice followed the Manfredi's conclusion, which is different from the Opinion of AG Kokott that '*civil liability of cartel members for umbrella pricing is also a matter of European Union law*' in

<sup>461</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, para 34

<sup>462</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, para 34

<sup>463</sup> See Marc Veenbrink and Catalin S Rusu, 'Case Comment – Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG*', *The Competition Law Review*, Volume 10 Issue 1, 108

<sup>464</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG* (Opinion), ECLI:EU:C:2014:45, para 2; See Roman Inderst, Frank P. Maier-Rigaud, Ulrich Schwalbe, 'Umbrella effects', *Journal of Competition Law & Economics*, 10(3), 762; See Hannes Beth, Cora-Marie Printer, 'Preisschirmeffekte: Wettbewerbsökonomische Implikationen für kartellrechtliche Bußgeld- und Schadensersatzverfahren', *WuW* 03/2013, 229-232

<sup>465</sup> See Marc Veenbrink and Catalin S Rusu, *supra* n 463, 108;

<sup>466</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG* (Opinion), ECLI:EU:C:2014:45, paras 43-46.

<sup>467</sup> See Marc Veenbrink and Catalin S Rusu, *supra* n 463, 114;

<sup>468</sup> *Ibid*, 115;

<sup>469</sup> Case C-557/12, *Kone AG and Others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317, para 17, 19.

As regards the burden of proof on damages suffered due to the umbrella effect, the national provisions, which could be difficult to prove in some member states, should still be followed.<sup>470</sup> The claimant should prove that firstly the damages have been caused due to the rise of the market price, and secondly the cartel is able to foresee that these damages resulted from the umbrella effect.<sup>471</sup> Furthermore, the basic approaches to quantify damages could be no different to the one applied by direct purchasers of cartellists.

### III. Summary

Private enforcement of the competition law in the EU has a development over the last decades from the decisions of the Court of Justice to the Green/ White Papers and the final Directive. The EU legislators choose to award ‘*any individual who suffered loss due to the violations of Articles 101 and 102*’ with the right to sue, which may include direct/ indirect purchasers, competitors, new entrants, umbrella customers. The potential injured persons may also include the producers of the complementary product that suffered the damages because of a decreased sales volume. In addition, the deadweight loss customers, the employees and shareholders of the injured companies may also suffer damage because of the infringement; it may be questionable whether they can also be an appropriate party to bring antitrust action for damages. The Directive provides significant rules regarding the procedural issues, such as the binding effect of the public decisions, the disclosure of the important documents and the passing-on defence. Issues like the competitors’ action and the standard of proof, causation are dependent on the national law, which is still to some extent uncertain for the EU because of the divergence of the Member States. Furthermore, there are still worries regarding the difficulties for indirect purchasers’ action due to the lack of the empirical evidence for the causality between harm and infringement, although the disclosure of important documents is available to them.<sup>472</sup> After the Directive has been signed into law, Member States have two years to adjust their national rules in order to be consistent with the provisions of the Directive.

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<sup>470</sup> See Michael Stöber, ‘Schadensersatzhaftung für Preisschirmeffekte bei Verstößen gegen deutsches oder europäisches Kartellrecht’, *EuZW* 7/2014, 261; See Alexander Fritzsche, ‘Jedermann kann-Anmerkungen zum Kone-Urteil des EuGH (Rs. C-557/12) zum Schadensersatz bei kartellbedingt eintretenden Preisschirmeffekten’, *NZKart* 11/2014, 430-431;

<sup>471</sup> See Till Schreiber, Vasil Savov, ‘Kone v Commission: Umbrella Damages Claims’, *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 8, 550

<sup>472</sup> See Andreas Schwab, ‘Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims’, *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 2, 67.

## Chapter C Comparative analysis

### I. Empirical analysis of antitrust action

#### 1. EU

As preparatory work, the 2004 *Ashurst Report* and the 2007 *Impact Study* make up two important sources for the empirical study of the EU antitrust action for damages.<sup>473</sup> Apart from these Reports, literatures in connection with the empirical analysis include: Barry Rodger's studies on the private action in the UK (1970-2008) and Sebastian Peyer's empirical research on private action in Germany (2005-2007).<sup>474</sup> In addition, the empirical analysis of the European antitrust action can also be found in: Simon Vande Walle's comparative work of the European and Japanese private enforcement in 2013.<sup>475</sup>

Before 2004, the situation was '*total underdevelopment*' and '*astonishing diversity*'. There were only around 60 judged cases for damages, consisting of 12 on the EC competition law, 32 on national law and 6 on both.<sup>476</sup> Among those the damages were awarded, 8 final decisions are based on the EC competition law, 16 on the national law, and 4 on both.<sup>477</sup> 3 Member States had a special statutory basis for antitrust damages action.<sup>478</sup> The UK had the specialized courts for dealing with competition based damages action. Most Member States provided general rules for designation of competent courts.<sup>479</sup>

In the period from 2004 to September 2007, there were 96 antitrust actions for damages based on EC competition law in 10 of the 27 Member States.<sup>480</sup> Among them, claims on vertical agreements were in the majority (61 of 96 cases), 13 related to horizontal agreements, 22 on the abuse of dominance.<sup>481</sup> However, it is interesting that success rates on damages awarded due to cartels (46%) and abusive behaviours (55%) are far higher than those on vertical agreements (approximate null).<sup>482</sup> Even in the case *Courage*, following the affirmation of the claimant's right to sue by the Court of Justice, it was overruled by the English House of Lords.<sup>483</sup> The number of stand-alone cases was relatively low. The 'clusters' of claims contributed a lot

<sup>473</sup> See Denis Waelbroeck et al, *Ashurst Report: Study on the conditions of claims for damages in case of infringement of EC competition rules*, Brussels 2004; see Andrea Renda et al, *Welfare impact and Potential Scenarios*, Final Report, Brussels, Rome and Rotterdam, 2007

<sup>474</sup> See Barry Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004-Part I', 27 *Eur. COMPETITION L. REV.* 241-248 (2006); see Barry Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004-Part II*, 27 *Eur. COMPETITION L. REV.* 279-292 (2006); see Barry Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004-Part III', 27 *Eur. COMPETITION L. REV.* 341-350 (2006); see Barry Rodger, 'Competition Law Litigation in the UK Courts: A study of all cases 2005-2008—Part I', 2 *Global COMPETITION LITIG. REV.* 92-113(2009); see Barry Rodger, 'Competition Law Litigation in the UK Courts: A study of all cases 2005-2008—Part II', 2 *Global COMPETITION LITIG. REV.* 136-147(2009); see Sebastian Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', *Journal of Competition Law & Economics*, 8(2), 331-359; see Sebastian Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany', *CCP Working Paper* 10-12, (2010), 1-74

<sup>475</sup> See Denis Waelbroeck et al, *supra* n 473, 1

<sup>476</sup> See Denis Waelbroeck et al, *supra* n 473, 1

<sup>477</sup> See Denis Waelbroeck et al, *supra* n 473, 1

<sup>478</sup> See Denis Waelbroeck et al, *supra* n 473, 1

<sup>479</sup> see Denis Waelbroeck et al, *supra* n 473, 1

<sup>480</sup> Andrea Renda et al, *supra* n 473, 39

<sup>481</sup> Renda et al, *supra* n 473, 40

<sup>482</sup> Renda et al, *supra* n 473, 40

<sup>483</sup> *Inntrepreneur Pub Company (CPC) et al. v. Crehan (HL)*, [2006] UKHL 38; Renda et al, *supra* n 473, 40

in the total number of actions (96 cases), including Motor Vehicle vertical agreements, oil vertical agreements, vitamin cartel and *Rc Auto* cartel.<sup>484</sup> The impact study concluded that during this period neither the successful damages actions nor the experiences of the Member States were common.<sup>485</sup>

Table 2: Cases by types and years from 2004 to 2007

Year	Art. 81 (cartel)	Art. 81 (vertical)	Art. 82
2004	0	17	3
2005	3	21	9
2006	3	18	6
2007	7	5	4
total	13	61	22
Damages awarded	46%	0%	55%

Rodger's studies divided the development of private enforcement in the Union competition law and national competition law in the UK into two periods: from the 1970s to 2005 and from 2005 to 2008. In the first period from the 1970s to 2005, 90 cases in connection with competition law issues were examined.<sup>486</sup> Among them, roughly 16 cases resulted in a full success and 7 carried partial successful consequence.<sup>487</sup> It followed that there were 27 cases in the subsequent four years from 2005 to 2008, yielding 41 judgments and 18 of the 41 judgments with full success.<sup>488</sup> The success rate shows a remarkable rise during the two periods.<sup>489</sup> Among these 41 judgments, 29 were stand-alone actions, accounting to 70.7%, whereas 12 of them were follow-on action (29.3%).<sup>490</sup> As regards the damages awarded from 2005 to 2008, 16 judgments pursued the damages or damages combined with other remedies to claimants and 8 succeeded.<sup>491</sup> The injunctive relief or the injunction combined with the declaration of the rescind contract were pursued in only 6 cases and were awarded in 4 cases.<sup>492</sup>

Peyer studied the 368 cases (conservative assessment) filed in Germany from 2005 to 2007.<sup>493</sup> Among them, 180 cases reached their final decisions in the first instance, 188 in the second instance including 24 before the Federal Court of Justice (Bundesgerichtshof, BGH).<sup>494</sup> The success rate in the 180 cases that ended with the first instance equates to 32.8%.<sup>495</sup> That in the cases concluded in the second instance (164 cases) is 32.3%, which shows no explicit difference to the numbers of the first instance.<sup>496</sup> The success rate before BGH is 45.8% (24 cases).<sup>497</sup> Follow-on actions only amount to 2.2% of the total 368 cases (4 cases), which is relatively low under the broad binding effect of the decision made by public authorities according to Section 33(4) of the German ARC.<sup>498</sup> 212 actions (57.6%) were brought by customers of the offenders; 65 by competitors (17.7%); 12 by dealers or suppliers; 1 was filed by indirect purchasers; 1 was by final customers.<sup>499</sup> 40 cases of the total number of cases claimed for damages; 84 for voidness; 51 for injunction; 50 for interim relief; 38 for conclusion of contract; 16 for

<sup>484</sup> Renda et al, *supra* n 473, 40

<sup>485</sup> Renda et al, *supra* n 473, 42

<sup>486</sup> See Barry Rodger, *supra* n 474, 244

<sup>487</sup> See Roger, *supra* n 474, 244-248

<sup>488</sup> See Barry Rodger, *supra* n 474, 96

<sup>489</sup> See Roger, *supra* n 474, 96

<sup>490</sup> See Roger, *supra* n 474, 99

<sup>491</sup> See Roger, *supra* n 474, 106

<sup>492</sup> See Roger, *supra* n 474, 106

<sup>493</sup> See Sebastian Peyer, *supra* n 474, 338; see Sebastian Peyer, *supra* n 474, 27

<sup>494</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 338

<sup>495</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 353

<sup>496</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 353

<sup>497</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 353

<sup>498</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 342

<sup>499</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 345

continuation of contract; 29 for unjust enrichment.<sup>500</sup> The case number that claimants won or partly won in damages actions accounts for 17.5%, whereas that of injunctive relief is higher (47.1%).<sup>501</sup> 66 of the total 368 cases were brought relying on EU law (49 under Article 101 and 17 under Article 102); 283 were filed under ARC, including 71 related to the restrictive agreement and 212 related to dominance and other unilateral conducts.<sup>502</sup> The average duration of the litigation was 17.01 months.<sup>503</sup>

## 2. China

In China, the formal numbers and statistics data from the court systems in private action of the AML is scant. The data on the numbers of cases accepted and ending in court for the whole of China (in Table 3) can only be found in annual *Report on Competition Law and Policy of China* and the information from *the Antitrust Civil Litigation Forum* (中国反垄断民事诉讼论坛).<sup>504</sup> The *Report* was published by the *Professional Committee on Competition Policy and Law (PCCPL) of China Society for World Trade Organization Studies (CWTO)* which is an Organization of the Chinese Ministry of Commerce. The Forum was supported by the Intellectual Property Tribunal of the Supreme People's Court. Therefore, data from the *Report* and the *Forum* can basically be deemed reliable and can be used for the further discussion. In addition, the judgments of most cases can be found on the *website Judicial Opinions of China* (<http://www.court.gov.cn/zgcpwsw/>); they are formally released by Chinese courts. It should be noted that the data in Table 3 and Figure 2 may neither include the cases that were dropped or reached the settlements nor the cases that referred to antitrust issues but were brought through another cause of action. Hence, the real number of the private action may probably exceed the number quoted below. According to the data below, it can be found that there was a large rise of cases in 2012 and 2013, when the Judicial Interpretation came into effect in June 2012. The situation as regards private enforcement before or after 2012 changed significantly. For pre-2012 private enforcement is summarized as: firstly, disputes in the cases were relatively simple.<sup>505</sup> It was not difficult for the court to arrive at a decision on it.<sup>506</sup> For example, in case *Huzhou Yiting* (2009), the major dispute was not the determination of the dominant position (which had already been agreed between the claimant and the defendant), but focused on whether the conduct was the abusive conduct prohibited by Article 17 of AML, which is relatively easier to determine. Secondly, the courts applied provisions of *the Tort Law*, *the Contract Law* or *the Law against Unfair Competition* to deal with cases pre-2012 due to the lack of detailed Judicial Interpretation on the antitrust action.<sup>507</sup> A large number of cases were solved through the judicial mediation conducted by courts, not the judgment.<sup>508</sup> Thirdly, in the absence of the Judicial Interpretation a large number of claimants failed to prove their claims.<sup>509</sup>

<sup>500</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 349

<sup>501</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 354

<sup>502</sup> See Peyer, *Journal of Competition Law & Economics*, 8(2), *supra* n 474, 357

<sup>503</sup> See Peyer, CCP Working Paper 10-12, (2010), *supra* n 474, 65

<sup>504</sup> Zhaoqi Cen etl (edt.), *Report on Competition Law and Policy of China* (2012), (中国竞争法律与政策研究报告, zhongguo jingzheng falv yu zhengce yanjiu baogao), Professional Committee on Competition Policy and Law (PCCPL) of China Society for World Trade Organization Studies (CWTO), Law Press•China, 2013, 111-112; the Antitrust Civil Litigation Forum was co-held by Competition Law Center of University of International Business and Economics and other organizations, and supported by Intellectual Property Tribunal of Supreme People's Court.

<sup>505</sup> Zhaoqi Cen etl (edt.), *supra* n 504, 109-110

<sup>506</sup> Zhaoqi Cen etl (edt.), *supra* n 504, 109-110

<sup>507</sup> Zhaoqi Cen etl (edt.), *supra* n 504, 109-110

<sup>508</sup> Zhaoqi Cen etl (edt.), *supra* n 504, 109-110

<sup>509</sup> Zhaoqi Cen etl (edt.), *Report on Competition Law and Policy of China* (2014), (中国竞争法律与政策研究报告, zhongguo jingzheng falv yu zhengce yanjiu baogao), Professional Committee on Competition Policy and Law (PCCPL) of China Society for World Trade Organization Studies (CWTO) (Law Press•China, 2014), 110

The Judicial Interpretation on AML in 2012 virtually encouraged the filing of private action which can be seen in the Figure below: the number of cases brought in 2012 and 2013 is larger than the one from the first four years (from 2008-2011). Some significant judgments emerged during this period, such as *Qihoo v. Tencent* (by the Supreme Court), *Rainbow v. Johnson & Johnson* (Shanghai High Court). The court began to assess and determine some complicated issues in the judgment, such as ‘the dominant position’, ‘the effect in eliminating or restricting the competition’. The litigants acquired the basic knowledge and experience regarding the burden of proof, which helped with submitting more evidence as regards their allegations.<sup>510</sup> There is no formal number of the successful claims. But according to the judgments that can be found on the website *Judicial Opinions of China*, the success rate is very low.

It should be noted that neither incomplete data as to private enforcement in China nor the six years of history (2008.8-2015) can provide a sufficient basis for further inference or conclusion. As more data and information on the settled cases become available, a more accurate analysis can be made. However, some preliminary inference can be summarized:

A large proportion of actions based on Article 17 of AML (abuse of dominant position) were filed by competitors, customers and other downstream purchasers with direct connections to the offenders or the disputes filed stand in direct connection with the illicit agreement or practice. The cases filed by indirect purchasers can still not be found for the six years of enforcement of AML in the period from 2008 to 2014. Basically, in most cases, the courts did not explicitly distinguish between ‘the claim filed due to loss of monopolistic conducts’ and ‘the claim filed due to the dispute because of the content of the agreement, the articles of an industry association’, which are prescribed in Article 1 of the Judicial Interpretation on AML.<sup>511</sup> The only exception is case *Wu Xiaoqin v. Shanxi Broadcast & TV Network Intermediary Group Co., Ltd*; the court explicitly indicated in its judgment that the claim was based on the dispute as to whether the content of the agreement constituted a breach of AML.<sup>512</sup>

A dramatic step forward for litigants and courts is delineation of the relevant market during the six years’ development. From the early cases in 2008 and 2009, such as *Renren v. Baidu*<sup>513</sup>, it was evident that the biggest dispute in the abuse of dominant position cases was the delineation of the relevant market. Legal uncertainty occurred due to lack of analysis methods and the necessary requirements as regards the evidence. Hence, the decisions of the courts also generated a lot of controversies. It was also the biggest obstacle for the claimants to show sufficient evidence and satisfy the proof requirement held by the courts. A large number of cases were dismissed by the court due to claimants’ failure as regards satisfying the proof requirement. A dramatic change came after the *Guide on the Relevant Market* (2009), the *Judicial Interpretation on AML* (2012) and the previous experience gathered in the dozens of cases during the first two or three years. A careful and relatively completed analysis of the delineation of the relevant market can be found in the case *Qihoo v. Tencent* decided by the Guangdong High Court and the Supreme Court and in the case *Rainbow v. Johnson & Johnson* decided by the Shanghai High Court.<sup>514</sup>

<sup>510</sup> Zhaoqi Cen etl (edt.), *supra* n 509, 111-112

<sup>511</sup> Zhaoqi Cen etl (edt.), *supra* n 509, 98-99

<sup>512</sup> Xiaoqin WU v. Shaanxi Radio [2012], Higher People Court of Shaanxi, Shaanxi High People’s Court [2013] No. 306 ([2013]陕民三终字第 00038 号), 12 September 2013, Chinese Competition Decision Summaries, Case date: 12 September 2013, available at <http://www.kluwercompetitionlaw.com/CommonUI/search.aspx?q=Wu%20Xiaoqin>

<sup>513</sup> Renren v. Baidu [2010], Higher People’s Court of Beijing, Beijing Final Commerce [2010] No. 489 ([2010] 高民终字第 489 号), 9 July 2010, Chinese Competition Decision Summaries, Case date: 9 July 2010, available at: <http://www.kluwercompetitionlaw.com/CommonUI/search.aspx?q=renren>

<sup>514</sup> Qihoo v. Tencent [2013], Supreme People’s Court of the People’s Republic of China, Supreme People’s Court [2013] No. 4 ([2013] 民三终字第 4 号), *supra* n 143; Rainbow v. Johnson & Johnson, Higher People’s Court of Shanghai, Shanghai Final Commerce [2012] No. 63 ([2012] 沪高民三 (知) 终字第 63 号), *supra* n 102

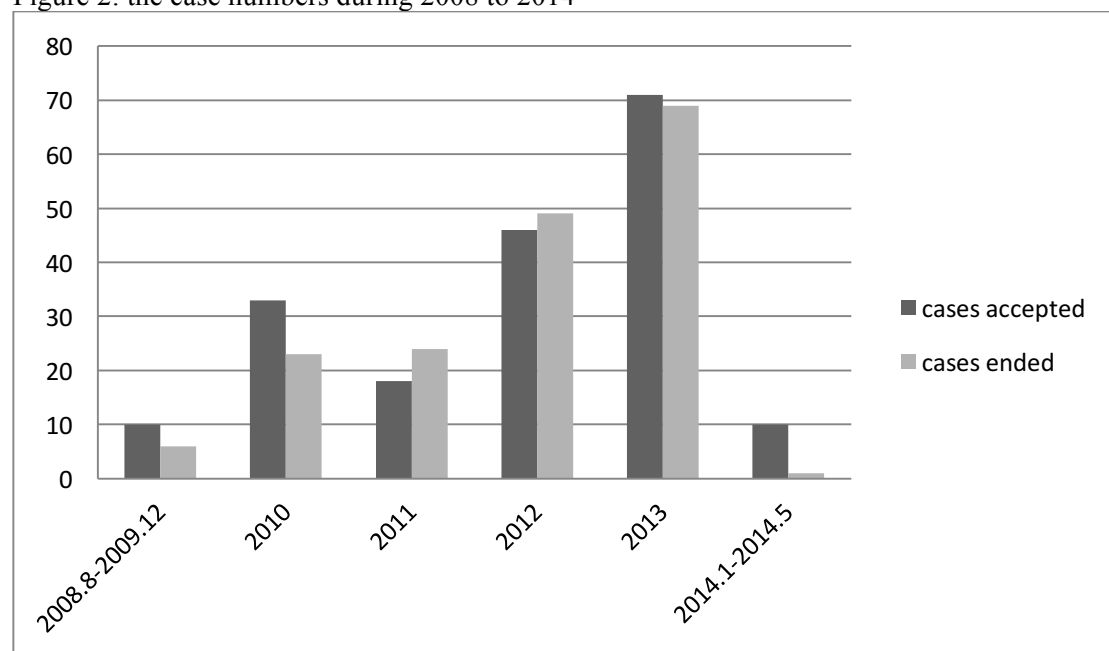
The antitrust law is new and constitute a sophisticated task for both public authorities and private parties. When AML first came into effect, an antitrust action was brought before the court, which is even earlier than public enforcement. The situation is a little different from that in the EU, where public enforcement has been exercised for many years by the Commission and NCAs and substantial experience as to applying the antitrust law has been gathered. It can somewhat explain why there were nearly 100% of unsuccessful claims for the claimants existed during the first two or three years.

However, despite the lack of experience and definite provisions, the achievement for private enforcement in China is not worse than for public enforcement, especially considering the number of cases filed and taken to completion. It shows the shortcomings of public enforcement on a limited financial and man-powered resource faced by the competition authorities. Private enforcement indeed complemented the shortcomings of public enforcement. But the question whether private action was strategically abused by competitors and other parties in the market as an anti-competitive tool cannot be arbitrarily answered with the settled cases and limited information.

Table 3: the case numbers during 2008 to 2014

Year	Accepted (the number of new cases)	Ended (the number of cases, including the cases from last year)
2008.8-2009.12	10	6
2010.1-2010.12	33	23
2011.1-2011.12	18	24
2012.1-2012.12	46	49
2013.1-2013.12	71	69
2014.1-2014.5	10	1
The total number	187	172

Figure 2: the case numbers during 2008 to 2014



## II. Relevant market under the economic approach

### 1. Economic approach in competition law

In the enforcement of the competition law, the economic evidence is important, especially for the definition of the relevant market. It is a new and complicated task for the trier of facts and parties in the litigation. In China, the experience regarding the relevant market in private action is limited and the case *Qihoo v. Tencent* is one of those that can be deemed the most complicated case and which providing a comprehensive assessment.

In 1999, the EU Commission revised block exemption on vertical restraints, which was deemed the beginning of the new '*more economic approach*'. As the former Competition Commissioner Mario Monti stated in his speech, '*this approach has inspired new legislation*', for example, the reform on the block exemption, the merger test and the application of Article 102.<sup>515</sup> One of the major characteristics of this '*more economic approach*' was summed up as '*the enforcement practice shall make increasing use of modern microeconomic insights and econometric tools when assessing allegedly anticompetitive conduct*', which requested the enforcers to apply neoclassical economic assessments, econometric methods and statistical data.<sup>516</sup> Economics already played a crucial role in public enforcement, not only by the Commission, but also by the national authorities, including in the domain of merger control proceedings and the application of Articles 101 and 102. These economic assessments and methods also play key roles in private litigation, especially in determining the illegality of the agreement or practice.

In China, although in the absence of an explicit signal of the economic approach, the enforcement of AML is virtually based on the so-called '*effect analysis*' which requests the use of the economics to delineate the relevant market, to assess the dominance and to quantify the harm sustained by the victims. Firstly, as regards the conspiracy, the '*monopolistic agreement*' laid down in Article 13 subparagraph 2 refers to the agreement, decision or other concerted practice that has the '*effect to eliminate or restrict competition*', which highlights the significance of '*effect analysis*' in defining the monopolistic agreement. Within the settled cases, the effect of the hard-core cartel – the pricing fixing agreement – was assessed by the civil court within the relevant market (case *Shenzhen Huierxun v. Shenzhen Pest Control*).<sup>517</sup> A remarkable case concerning the assessment of the restrictive effect of vertical agreement (RPM) is *Rainbow v. Johnson & Johnson*, in which the relevant market, the market power, the motivation of RPM and anti-competitive and pro-competitive effect were assessed in detail.<sup>518</sup>

### 2. Role of the relevant market

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<sup>515</sup> Mario Monti, 'A Reformed Competition Policy: Achievements and Challenges for the Future', Centre for European Reform, Brussels, 28 October 2004, available at: [http://ec.europa.eu/competition/publications/cpn/2004\\_3\\_1.pdf](http://ec.europa.eu/competition/publications/cpn/2004_3_1.pdf)

<sup>516</sup> See Wolfgang Wurmnest, *supra* n 406, 1

<sup>517</sup> See *Shenzhen Huierxun v. Shenzhen Pest Control Association*, High People's Court of Guangdong, Guangdong Final Commerce [2012] No.155 ([2012] 粤高法民三终字 155 号), Chinese version available at: [http://www.pkulaw.cn/case/pfnl\\_118496821.html?match=Exact](http://www.pkulaw.cn/case/pfnl_118496821.html?match=Exact)

<sup>518</sup> See *Rainbow v. Johnson & Johnson*, Higher People's Court of Shanghai, Shanghai Final Commerce [2012] No. 63 ([2012] 沪高民三 (知) 终字第 63 号), 1 August 2013, *supra* n 102

## a. The role of the relevant market in antitrust actions

In light of the economic approach, the delineation of the relevant market plays a crucial role in the so-called ‘*effect analysis*’ of the anti-competitive agreement or behaviour and in determining the market power of offenders, which is imperative in public investigation as well as in the private litigation.

In China, delineation of the relevant market is governed by *the Guide on Relevant market*, which was adopted by the Chinese Anti-Monopoly Commission in 2009 and can be applied by all the competition authorities. The basic principles and methods of this *Guide* have been followed by the Shanghai High Court and the Chinese Supreme Court in the case *Rainbow v. Johnson & Johnson* and the case *Qihoo v. Tencent* respectively.

The role of the relevant market has been explicitly stated in Article 2 in *the Guide on Relevant market*, which provides the basic provisions for the delineation of the relevant market regarding the enforcement of the competition law in China. It addressed in Article 2 firstly that ‘*the delineation of the relevant market is to specify the scope of the market that the undertakings compete with each other*’.<sup>519</sup> It refers to the implementation of the competition law, including the prohibition of the monopolistic agreement, the prohibition of the abuse of the dominant position and the examination of the concentration of the undertakings to eliminate or restrict competition, etc.<sup>520</sup> The relevant market is the starting point of the assessment of the alleged monopolistic behaviour, which plays a key role in determining the market share, the level of concentration, the position of undertakings in the market, the effect of the behaviour of undertakings in the market, the illegality of the behaviour and the liabilities of the alleged offenders.<sup>521</sup>

In the EU, the Court of Justice and the Court of First Instance (General Court) have confirmed the basic conception and principles of the relevant market in a series of cases, which undoubtedly have a binding effect on the national courts when applying the EU competition law to determine the relevant market issues. Furthermore, the Commission has issued a Notice on the relevant market, i.e. *Commission Notice on the definition of relevant market for the purposes of Community competition law*, which does not have the direct binding effect in national courts. But it cannot be precluded that the basic principles and methods are followed by the national courts indirectly. For example, the French Competition Authorities (the *Autorité de la concurrence*) followed the basic methods of the Commission’s Notice in defining the market, most of which have been confirmed by the Court of Appeal and the French Supreme Court. In brief, the Commission’s Notice provides some insightful principles and detailed methods for our discussion, although it has no direct binding effect in the national court.

As regards the role of the relevant market in private litigation, first of all, it is the starting point in some stand-alone actions.<sup>522</sup> In the follow-on action, the national court cannot adopt a decision that could run counter to the final infringement decision released by the Commission.<sup>523</sup> According to the present EU Directive on antitrust damages action, the final decision of domestic competition authorities and of domestic review courts should be deemed

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<sup>519</sup> Article 2 Paragraph 1 sentence 2 of the Guide on Relevant Market

<sup>520</sup> Article 2 Paragraph 1 sentence 3 of the Guide on Relevant Market

<sup>521</sup> Article 2 paragraph 2 sentence 1 of the Guide on Relevant Market

<sup>522</sup> As a comparison, the Court of Justice in case *Continental Can* confirmed that the definition of the relevant market is the first step for the Commission to analyse the market power of the undertaking. It stated that ‘...the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.’ Case 6/72, *DEPE-Europeballage Corporation and Continental Can Company v Commission*, [1973] E.C.R. 215, para 32 and 37

<sup>523</sup> Article 16 of the Regulation 1/2003

irrefutable; the decision of foreign competition authorities and of the foreign review courts have been deemed at least *prima facie* evidence.<sup>524</sup> In addition, not all the stand-alone actions request a delineation of the relevant market. As concerned the application of Article 102 TFEU, defining the relevant market is a significant pre-condition for further determination of the dominance. According to Article 101 TFEU, one of the important factors that needed to be examined regarding the infringement is the restriction by ‘*object or effect*’. When it can be determined that the agreement fell within the restriction by object, there is no need to review the effect of the agreement. Therefore, in the EU, most of agreements do not need any effect assessment, including hard-core cartel, RPM and other agreements listed in Article 101(1). But if the restriction by object cannot be explicitly established, the anti-competitive effect is in demand, such as the joint R&D agreement. Both the EU and Chinese competition law provide exemption rules which should be directly applied by civil courts. Summing up, the effect of the agreement including the delineation of relevant market is common factors that are needed to be examined in the action.

## **b. Definition of the term ‘relevant market’ and the basic methods**

Before discussing the methods of delineation of the relevant market in private action, it is necessary to briefly examine the definition of the term ‘relevant market’ in the EU and in China. Article 12 paragraph 2 of AML defines the ‘*relevant market*’ as ‘*the range of the commodities for which, and the regions where, undertakings compete with each other during a given period of time for specific commodities or services*’. It consists of the relevant product market<sup>525</sup> and the relevant geographic market<sup>526</sup> under the consideration of the temporal factors (such as production phase, the deadline to use, seasonal variation, fashion, the term of protection of the IPRs, etc.), the IPRs and the innovation (Article 3 of the *Guide on Relevant Market*). In the EU Commission’s Notice, the term ‘*relevant product market*’ was defined as the market that consists of the products which are ‘*interchangeable or substitutable*’ by the consumer according to their ‘*characteristics, prices and intended use*’.<sup>527</sup> The ‘*relevant geographic market*’ is the market, ‘*in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*’.<sup>528</sup>

From the definition of the term ‘*relevant market*’, it can be found that the key factor that needs to be taken into account in defining the relevant market is substitutability. On the one hand, the demand substitution that examines whether the customers will turn to other products as substitutes. Factors that need to be assessed include the function, the quality, the price and the ease of purchase, etc., which are confirmed in the Chinese *Guide on Relevant Market*.<sup>529</sup> The Commission highlighted the term ‘*interchangeable or substitutable*’ on characteristics, prices and intended use of products. On the other hand, apart from demand substitution, the supply substitution also plays a supplementary role in delineating the relevant market, which considers factors such as the competitors’ investment in production equipment, risk and delay to entering the market. As regards the methods to define the relevant market, both China’s and EU’s policy-makers have underlined a quantitative test - SSNIP (‘*small but significant and non-transitory*

<sup>524</sup> Article 9 of the Directive

<sup>525</sup> The relevant product market is defined in Article 3 paragraph 2 of the Guide on Relevant Market as ‘a market that is constituted by a group or a category of commodities that have been deemed as close intersubstitutability by the customers according to the commodities’ characteristics, the function and the price, etc.’.

<sup>526</sup> The relevant geographic market is defined in Article 3 paragraph 3 of the Guide on Relevant Market as ‘the geographic region where the customers can purchase the commodities that have close intersubstitutability’.

<sup>527</sup> Para 7 of the Commission’s Notice on the definition of relevant market

<sup>528</sup> Para 8 of the Commission’s Notice on the definition of relevant market

<sup>529</sup> Article 5 of the Guide on Relevant Market

increase in price') - as one of the significant methods applying the economic tool to analyse the data and hence to determine whether the customers would switch to substitutes provided that the alleged product's price was increased by just 5% to 10% as a small and non-transitory increase.

### c. Delineation of the relevant market in private litigation

Two Chinese cases – *Rainbow v. Johnson & Johnson* and *Qihoo v. Tencent*, offered some noticeable experience as to delineating the relevant market by attempting to adopt the economic report and statistical data. The case *Rainbow* involved RPM agreement and the substitutability analysis had been applied by the Shanghai High Court. Another remarkable case is *Qihoo v. Tencent*, in which the abuse of dominance was claimed. In *Qihoo*, the Supreme Court answered 9 questions concerning the relevant market under the economic analysis and evidence.<sup>530</sup> A similar communication service case that requested a market definition by the EU Commission is the merger case *Microsoft/Skype*, which may offer some references. Several preliminary practical conclusions can be summarised from these cases.<sup>531</sup>

### d. Experience in *Qihoo v. Tencent* under the economic approach

#### aa) SSNIP or SSNDQ in the communication service market

One of the questions brought in *Qihoo* queried whether the SSNIP test can still be applied in the case of free of charge products. In the first instance, the Guangdong High Court clearly confirmed that 'free of charge' is the common and basic service model of the internet industry.<sup>532</sup> It acknowledged the high degree of sensitivity of the customers on the price. In other words, assuming that even if the product starts to charge a small amount of money, the customers' first choice would be to switch to potential substitutes. The revenues of IM software are obtained through the advertisement. The hidden costs that customers should afford are mainly the opportunity costs for advertisement. Guangdong High Court also confirmed the important roles of these hidden costs and of the quality of the IM software in delineating the relevant market. But the High Court ultimately did not disaffirm the application of SSNIP in this case. It stated in the judgment that '*it can be considered whether the customers will turn to the other closely interchangeable products that can be added to the same market, provided that the price of the IM Software has been raised from zero to a small amount*'.<sup>533</sup>

However, the application of SSNIP was denied by the Supreme Court in the second instance of this case, in which it held that SSNDQ ('small but significant and non-transitory decrease in

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<sup>530</sup> These questions ask: whether it is necessary to define an explicit relevant market; whether HMT is an appropriate method for this case and the court of first instance has correctly applied it; whether the text, audio and video should be in relevant market; whether the mobile instant messaging service should be in relevant market; whether the SNS and Weibo should be in relevant market; whether SMS and email should be in relevant market; whether the relevant market in this case can be defined as internet application platform; what is the relevant geographical market; whether the delineation of the relevant market should consider the circumstance of the market and the future development after the alleged behaviour.

<sup>531</sup> The Commission's Notice on the definition of the relevant market can be applied in determining the dominant position as well as the merger review. Therefore, the merger case *Microsoft/Skype* can be used as a comparison.

<sup>532</sup> *Qihoo v. Tencent* [2013], Guangdong High Court of the People's Republic of China, Guangdong High Court ([2011] No. 2 ((2011) 粤高法民三初字第 2 号), 15 November 2011, *supra* n 143

<sup>533</sup> *Qihoo v. Tencent* [2013], Guangdong High Court of the People's Republic of China, *supra* n 143

quality') could be more appropriate for this case rather than SSNIP. The Supreme Court explained that even a small rise of prices between 5% and 10% may probably imply a dramatic change for the population of users based on the characteristics of the products and the profit model of the industry, which cannot provide a proper indicator for the relevant market.<sup>534</sup> On choosing between SSNIP and SSNDQ applied in a free-charged product, the Supreme Court cited the data from CNNIC report, iResearch report (2010-2011) and eNet survey by declaring that more than 60% of customers will switch to other products.<sup>535</sup> In *Microsoft/Skype*, the Commission cited a similar number of only 6% of Skype users would prefer to pay for the IM service and more than 75% users are free-charged customers and indicated the same conclusion, namely that the customers would immediately turning to the substitutes once the product started to charge the fee.<sup>536</sup> The internet messaging products are heterogeneous and mostly compete on quality, service and innovation, under which SSNDQ is a reasonable method for the IM software market.

## bb) Demand substitution

Demand-side substitutability is basically the major force on pricing that needs to be considered in defining relevant market, while the supply-side is usually applied as a complement. In *Qihoo*, the Supreme Court assessed the competitive constraints from characteristics, functions, quality and ease of purchase. For instance, it assessed whether other stand-alone communication services such as text messaging, voice call or video call (eg. *Weibo desktop* and *Renren desktop* only have text messaging, but do not have video and voice call) can be deemed as the substitutes in the relevant market.<sup>537</sup> The alleged product *Tencent QQ* is application with multiple communication services including text, voice call and video call. The Supreme Court stated that it is almost the same as the stand-alone software from the point of view of characteristics, ease of purchase and functions. As regards the frequency to use and consumer preference, the CNNIC report was invoked to show that most of customers (93.2%) use the text messaging, while the customers of voice and video call only account for 57.2% and 54.1% respectively. The Supreme Court illustrated that the different preferences weaken the differentiation between the functions of stand-alone and *Tencent QQ* and hence confirmed the stand-alone services can constitute the relevant market. A similar problem was faced by the Commission in *Microsoft/Skype*, in which the Commission underlined the trend that most of the consumer communication applications offer the three services (such as *Microsoft*, *Google* and *Apple*) and there is therefore no need to split them further.<sup>538</sup>

## cc) Supply substitution

Supply-side substitutability plays a supplementary role in assessing the relevant market, which normally entails the issue of whether the suppliers can adjust the production quickly without significant cost and risk. In *Qihoo*, taking the aforementioned application of stand-alone service

<sup>534</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

<sup>535</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

<sup>536</sup> COMP/M.6281 – *Microsoft/Skype*, Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, 7 October 2011, para 75-77

<sup>537</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

<sup>538</sup> COMP/M.6281 – *Microsoft/Skype*, Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, 7 October 2011, para 28; in addition to the application of stand-alone service, the Supreme Court also assess whether the mobile IM service, SNS, Weibo, SMS and email can constitute the relevant market and whether the relevant market can be defined as internet application platform.

as an example, the Chinese Supreme Court opined that there is almost no technical barrier for the providers of stand-alone service to switch to the application of multiple services.<sup>539</sup>

#### dd) Geographic market

The method to define the geographic market is analogous to the method of delineation of the product market, i.e. whether the products in other regions would create competitive constraints on the undertaking, provided that the price or the quality has been changed. In this case, the main dispute is whether the relevant geographic market is mainland China or worldwide. One of the features of the IM software is the lack of transportation cost, marginal cost and technical barrier. Hence, the Chinese Supreme Court assessed the competitive constraints based on the actual region chosen by most users, legal or regulatory barriers and foreign competitors. It defined the geographic market as mainland China by addressing the reasons including: i) most Chinese users choose the IM service provided by Chinese undertakings; ii) foreign competitors shall establish the Sino-foreign joint ventures in order to enter the Chinese market according to the related laws and regulations; iii) the foreign competitors cannot virtually create competitive pressure on the Chinese undertakings.<sup>540</sup> A major difference between the EU and China on the relevant market could be that there is no legal barrier in the EU hindering the consumers to use the foreign IM service. But in Microsoft/Skype, the Commission still defined the consumer communication service market as ‘at least EEA-market’, although it also affirmed ‘limited differentiation’ worldwide.<sup>541</sup>

### 3. Economic analysis and expertise

The SSNIP test requests an econometric analysis and a large amount of statistical data, which could be a complicated challenge for the trier of fact and the parties in the antitrust action. The Commission’s Green paper underlined the significance of expertise in antitrust action for the efficient proceedings and proposed the question pertaining whether the expert should be appointed by the court or by the parties themselves.<sup>542</sup> Basically, there are three approaches of expertise in litigation among Member States: court-appointed expert, expert witness (expert appointed by a single party) and an expert appointed by mutual agreement of the parties.<sup>543</sup> Taking Germany (the traditional civil law country and inquisitorial judicial system) as an example, the major expertise approach is the court-appointed experts according to section 144(1) 1<sup>st</sup> sentence of the German Code of Civil Procedure (ZPO). The court may select an expert or economic consulting firm that may prepare a written report and/or even an oral testimony before the court.<sup>544</sup> Furthermore, the litigants in the action can appoint their experts to provide the supporting analysis on their allegations. It should be noted that only the evidence submitted by the court-appointed expert can be deemed ‘strict evidence’.<sup>545</sup> The court has the discretion to adopting the opinion of the court-appointed expert, direct the expert to submit a new report or even appoint another expert. If there is a conflict between the court-appointed experts and

<sup>539</sup> Qihoo v. Tencent [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

<sup>540</sup> Qihoo v. Tencent [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

<sup>541</sup> COMP/M.6281 – Microsoft/Skype, Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, 7 October 2011

<sup>542</sup> Green Paper, 2.9

<sup>543</sup> Denis Waelbroeck et al, *supra* n 478, 65

<sup>544</sup> Section 411(3) of ZPO

<sup>545</sup> See Jochen Burrichter and Thomas B. Paul, ‘Economic Evidence in Competition Litigation in Germany’, in: Hüscherlath and Schweitzer (eds.), *Public and Private Enforcement of Competition Law in Europe*, Springer-Verlag Berlin Heidelberg 2014, 198; see Sven Timmerbeil, ‘The Role of Expert Witnesses in German and U.S. Civil Litigation’, *Annual Survey of International & Comparative Law* Vol.9 Issue 1, 178

experts of the parties, the German Federal Court of Justice stated that the court needs to ‘provide a plausible and logical reason for its decision to follow the sentiment from court-appointed experts’.<sup>546</sup>

The parties in the antitrust action can appoint 1-2 experts to present an oral or written testimony in court according to Articles 12 and 13 of the Judicial Interpretation on AML:

**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 failed 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.*

Basically, the major approach regarding the expertise is the expert witness which has been laid down firstly in Article 61 of the Chinese Civil Procedure Law.<sup>547</sup> The Chinese court does not preclude foreign economists or organizations to act as experts or submit professional research.

The Supreme Court as the appeal court in the case *Qihoo v. Tencent* provided some notable viewpoints on the qualification of the expert. In this case, the appellant Qihoo appointed *RBB Economics LLP* and a consultant from Charles River Associates (CRA) to submitted four economic reports on this dispute.<sup>548</sup> The appellee Tencent submitted a report by *iResearch*<sup>549</sup> and testimony by an expert. Firstly, as regards the qualification of the expert, the appellee Tencent questioned the education, experience and research achievements of the consultant from CRA who had been appointed by Qihoo. The Supreme Court stated that ‘the review on the expert’s opinion should focus on whether there are sufficient facts or data as the basis of the opinion; whether the market research or economic method is reasonable and reliable; whether the relevant facts that may alter the market research or economic method are taken into account; and whether the expert has the diligent and cautious responsibility as the professional person’.<sup>550</sup> The Supreme Court further addressed that the specialized experience and studies of the expert should be properly noted rather than over-requested.<sup>551</sup> Secondly, the Supreme Court confirmed the opinions of the expert should be limited to the economic analysis.<sup>552</sup> The RBB

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<sup>546</sup> Federal Court of Justice, Decision of 12 January 2011, ref. IV ZR 190/08, NJW-Rechtsprechungsreport 2011, pp.609; see Jochen Burrichter and Thomas B. Paul, *supra* n 545, 197

<sup>547</sup> Article 61 of Civil Procedure Law provides that ‘litigants can apply to court for 1 or 2 persons with special knowledge before the court to explain special questions. ...judges and litigants can inquiry the persons with special knowledge before court. ... with the permission of the People’s Court, the persons with special knowledge appointed by parties can confront with each other on the questions of the case.’

<sup>548</sup> The four reports include: RBB, *Qihoo 360 v. Tencent*: economic comment on the judgment of Guangdong High People’s Court (奇虎 360 诉腾讯: 对广东省高级人民法院判决书的经济分析, qihu 360 su tengxun: dui guangdongsheng gaoji renmin fayuan panjueshu de jingji fenxi); RBB, *Qihoo 360 v. Tencent*: comment by RBB on GEG economic analysis report (奇虎 360 诉腾讯: RBB 对 GEG 经济分析报告的评论, qihu 360 su tengxun: RBB dui GEG jingji fenxi baogao de pinglun); CRA, The economic report on 360 and Tencent antitrust action (关于 360 和腾讯反垄断诉讼案件的经济分析报告, guanyu 360 he tengxun fanlongduan anjian de jingji fenxi de baogao); CRA, The refuted report to GEG (对 GEG 的反驳报告, dui GEG de fanbo baogao).

<sup>549</sup> The report is China Instant Messaging and Its User Behavior Report (中国即时通讯年度监测及用户行为研究报告 2012-2013, zhongguo jishi tongxun niandu jiance ji yonghu xingwei yanjiu baogao 2012-2013).

<sup>550</sup> *Qihoo v. Tencent* [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

<sup>551</sup> *Qihoo v. Tencent* [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

<sup>552</sup> *Qihoo v. Tencent* [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

report made a comment on the legal issues of the judgment of first instance, which was inappropriate and inadmissible.

#### 4. Confidential data

The economic analysis and evidence in antitrust action inevitably involve the confidential data and information of the undertakings. The final decision of the action is increasingly accurate with the widest possible collection of evidence. The claimant may obtain important commercial information from the disclosure of confidential data and the economic analysis of other parties or expert appointed by the court. There is also a risk that these data will be abused for the non-lawsuit goals, which may deter the parties from producing the evidence. For example, *Burrichter* and *Paul* mentioned that all the parties in the German cement cartel obtained the 'raw dataset' in the hand of the expert of the court and hence proposed their own economic report.<sup>553</sup> They queried whether such disclosure would deter the defendants from submitting the economic report to prove their allegations. It is important to ensure that the data submitted in the litigation should only be used within litigation, not for commercial usage, blackmail settlement or fishing expedition. Accordingly, two vital issues should be examined in the continuing future litigation: (1) whether the claim virtually has any merit; (2) whether there are sufficient procedure tools to protect the confidential data. As regards the first issue, in the EU, the national court should carry out an examination on the request of disclosure as to whether it is consistent with the proportionality principle and whether the facts and evidence of the claim (or) its defence can justify the request.

More importantly, the protection measures should be laid down in the procedure law so as to limit the usage of the confidential data in the litigation. Taking the German law as an example, Section 172 No.2 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*) provides that the exclusion of the public in trials is under the condition that '*an important business, trade, invention or tax secret is mentioned, the public discussion of which would violate overriding interests meriting protection*'. A similar rule in China is Article 11 of the Judicial Interpretation on AML<sup>554</sup> governing the protection of confidential evidence that

*'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 the trial in camera, restricting or prohibiting photocopying, limiting disclosure of documents solely to attorneys, ordering parties to sign a confidentiality declaration, etc., upon the application of the parties or at the court's own discretion.'*

Summing up this Article, the protection instruments mentioned include '*trial in camera*', '*restricting or prohibiting photocopying*', '*limiting disclosure of documents solely to attorneys*' and '*the confidential commitment*'. Apart from the '*trial in camera*', other three more measures focus on preventing the parties in the litigation from uncovering and abusing confidential data. But the Judicial Interpretation on AML did not offer any penalty rule against the failure to comply with this confidential Article. It is questionable whether one party can claim an injunctive or compensatory relief against the abuse of confidential data or whether the court of the antitrust action can impose some penalties against the abuse of confidential data.

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<sup>553</sup> See *Burrichter Jochen* and *Thomas B. Paul*, *supra* n 545, 223-224

<sup>554</sup> This Article is consistent with Article 68 of CPL that provides that '*...evidence as regards the national secret, commercial secret and individual privacy shall be kept confidentially. The one that needs to be exhibited in court shall not be exhibited in trial in open court*'.

## 5. Summary

In sum, the delineation of the relevant market is imperative in determining infringement, especially for China where both the agreement and the abuse of dominance request an effect assessment. On the one hand, it cannot be denied that the communication service shares a lot of different features with other traditional products. On the other hand, the approach that the Chinese Supreme Court adopted in this case is also common for all the case regarding the relevant market. Although the experience regarding the delineation of the relevant market in China is still limited, the judgment of the Chinese Supreme Court indeed offers some noticeable experience. The SSNIP test as a quantitative analysis plays an imperative role in delineating the relevant product and geographic market, which has been confirmed in China and the EU. But one of the contributions of the case *Qihoo v. Tencent* is that sometimes the quality of the product other than the price should be the major indicator for defining the relevant market according to the characteristics and profit model of the product. The delineation of the relevant market in private litigation could be no different from that found in public enforcement, but it cannot be denied that it is a new challenge for courts and parties in private litigation. Therefore, the economic expert and competition authorities could probably provide important assistance in illustrating economic issues.

## III. Proof of dominance and damages

### 1. Overview

In addition to the relevant market, other imperative factors such as the dominant position, the causal link and the quantification have usually been deemed difficult to deal with. In antitrust action, the trier of fact may be faced with the complicated economic and econometric analysis and various models and/or methods. In China and the EU nowadays, there is nowadays some experience regarding the dominance and damages, such as the Chinese case *Qihoo v. Tencent*, *Rainbow v. Johnson & Johnson* and the *German cement cartel*. In this part, these cases will be discussed and several preliminary standards or approaches regarding issues such as the application of econometrics, the requisite elements in the dominance can be made.

### 2. Standard of proof

It should be noted that the legal standard of proof on infringement is higher than that on causation and harm and the requests on proof burdened by claimants on the causation is higher than that on the quantification. For instance, the courts in both Germany and China will ask for a higher standard of proof on causation than quantification. The court usually requests an extremely high legal standard on proving causation (99.9% probability) and a relatively low standard for the quantification. To be specific, in China, the request regarding the standard of proof on causation is governed by Article 73 of Judicial Interpretation on Evidence which provides the ‘with high probability’ rule that

*‘if parties submitted opposing evidences on the same fact, which did not suffice to deny each other, the People’s Court shall according to circumstance of the case estimate whether the evidential value of one party is evidently higher than that of another party and affirm the evidence with higher evidential value.’*

*If the evidential value of the evidences cannot be estimated so that the fact is difficult to determine, the People's Court shall make the decision according to the provision of the burden of proof.'*

Quantification is not a necessary factor needing the claimant to be burdened. In the judgment of case *Rainbow v. Johnson & Johnson*; the judge stated that '*... in monopoly dispute claims, the determination of the liability of the defendant entails the monopolistic behaviour (including the agreement), injury and casual links between monopolistic behaviour and injury.*'<sup>555</sup> But on the quantification of the loss of profit, the court used its discretion to quantify the amount of loss proactively and ultimately awarded ¥530,000 Yuan compensation after denying the methods alleged by the claimant. In Germany, the courts usually request a relatively high certainty on proving an adequate causal link, while on the quantification of damages the courts have a broad discretion.<sup>556</sup> In a German court, judges often order the economists to submit different assessments as to causation and quantification respectively as a result of different legal standards.<sup>557</sup> The judge usually has a large discretion on choosing a plausible and reliable economic method in determining the causation and quantifying the damages.

### 3. Lightening the burden of proof

Before discussing proof of the dominance and the damages, it is necessary to review the current rules regarding the rebuttable presumptions on the dominant position and the causal link in China and the EU respectively. These rules can lighten obstacles faced by the claimant in private action. But it cannot be denied that both dominance and the damages are still important or even indispensable parts of the litigation, which may request a comprehensive analysis.

First of all, Article 7 of the Judicial Interpretation on AML that provides a shifting burden of proof concerning the horizontal agreement, which can be deemed as a complementary rule to the lack of *per se* illegal rule in AML. Apart from this rule, Articles 9 and 10 govern the rebuttable presumptions on determining the dominant position of public utilities and self-promotion.<sup>558</sup>

**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*

<sup>555</sup> *Rainbow v. Johnson & Johnson*, Higher People's Court of Shanghai, *supra* n 102

<sup>556</sup> BGHZ 53, 245 = BGH NJW 1970, 946; see Hanns A. Abele, Georg E. Kodek, Guido K. Schaefer, *supra* n 364, 849

<sup>557</sup> See Jochen Burrichter and Thomas B. Paul, *supra* n 545, 205; see Hanns A. Abele, Georg E. Kodek, Guido K. Schaefer, *supra* n 364, 849; As introduced in chapter B, the Court of Justice stated in case *Manfredi* that the '*causal relationship*' should be governed by national law, subject to principles of effectiveness and equivalence. The EU Directive did not govern any uniform rule on determining the causation. The only exception is the rebuttable presumption of passing on overcharge in Article 14(2) and the rebuttable presumption on cartel in Article 17(2).

<sup>558</sup> As regards the reasonability of these presumptions, on one hand, the public utilities do not definitely imply a dominant position, because there are many enterprises in the industries such as telecommunication or electricity and it is possible that one of these enterprises only possesses a small market share. This opinion has been indicated by Chinese court in case *Li v. Shanxi Telecom and Xian Telecom*. On the other hand, it can be doubted whether the presumption relying on the self-promoting information can be justified as considering the self-promotion could probably be the exaggerating information.

*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.*

Secondly, the EU's Directive laid down a rebuttable presumption on the causal link between the cartel and damages in Article 17(2), which provides that '*it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.*' A similar provision is discussed by *Burrichter* and *Paul*, who introduced the *prima facie* in proving causation of hard-core cartel, which was invoked by the Federal Court of Justice in administrative cases.<sup>559</sup> The *prima facie* evidence is only applied in cases without the passing-on and in cases where the change of price is compatible with the cartel.<sup>560</sup>

#### 4. Dominance

In determining the dominant position, it should be noted that a range of factors are needed in order for it to be considered by the court. A high market share cannot definitely infer a dominant position without considering the barriers to entry or other factors. In the EU's competition law, although Article 102 TFEU does not specify which relevant factors should be taken into account when assessing the dominant position, the Court of Justice has already affirmed the significance of market share and the barriers to entry in a series of judgments. For example, in *Vitamins*, it addressed the imperative role of market shares as '*... very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position*'.<sup>561</sup> The Court of Justice further underlined the importance of '*a stable market share*' and other factors that used by the Commission to determine the predominance of the undertaking in the subsequent case *AKZO*.<sup>562</sup> In addition, the Commission used the customer dependence to assess the dominant position of the undertakings that are the suppliers of scarce products in *AGB*.<sup>563</sup>

In China, the relevant factors listed in Article 18 of AML include market share, intensity of competition, the ability to control the market, financial and technological resources, customer dependence, barriers to entry, as well as other factors. In the case *Qihoo v. Tencent*, the Chinese Supreme Court conducted a comprehensive dominance assessment and a range of factors have been considered. The defendant *Tencent* had at least 80% of the market share. The Supreme Court followed the economic viewpoint that the high market share without the entry barrier does not consequentially lead to the dominant position. A predominant feature of the IM software is that the population of users is likely to increase or decrease dramatically within a short period of time.<sup>564</sup> As regards the entry barrier, the statistical data of the population of the users of substitute products from 2007 to 2012 have been quoted to substantiate the dramatic increase of users within a short period of time and the low barrier to enter the market.<sup>565</sup> In addition, the Supreme Court affirmed the low competitor dependence and low customer dependence on the defendant's software by addressing that the cost of switching is relatively low and there is no cost of transportation and contractual commitment in this case.<sup>566</sup> Finally, the claimant claimed that the fact that the defendant forced their customers to '*choose one of two*' implied market power. The Supreme Court addressed that it did not imply the market

<sup>559</sup> See Jochen Burrichter and Thomas B. Paul, *supra* n 545, 205-206

<sup>560</sup> See Jochen Burrichter and Thomas B. Paul, *supra* n 545, 205-206

<sup>561</sup> Case 85/76, *Hoffmann-La Roche v Commission*, [1979] E.C.R. 461, para 41

<sup>562</sup> Case 62/86, *AKZO v Commission*, [1991] E.C.R. I-3359, para 59-61

<sup>563</sup> European Commission, Decision 77/327/EEC *ABG oil companies operating in the Netherlands* [1977] OJ L 117/1

<sup>564</sup> The Supreme Court cited the data that MSN who had 40% market share in 2011 lost 100Million users in 2012.

<sup>565</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

<sup>566</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

power since the numbers of the users of competitors increased largely during the performance period.<sup>567</sup>

Summing up the experience of the case *Qihoo v. Tencent*, a large part of the Chinese Supreme Court's judgment focused on dealing with the various economic issues on determining the infringement. Both experts of the claimant and of the defendants presented their economic studies and statistical data concerning crucial economic issues. Their economic views were cross-examined and direct-examined. The Court also collected at its discretion some evidences that was not presented by the parties but was important for the case. Apart from this, the Supreme Court did not appoint any experts to present a special report or oral testimony. The decisions on economic issues made by the Court were based on the facts of the case and the features of the industry and undertakings.

## 5. Causation and quantification

### a. But-for test

Under the *but-for* test, one of the most pronounced difficulties as to the determination of causation and damages is the establishment of the non-infringement scenario. Sometimes the non-infringement scenario can be easily found when following the expectations of the injured persons, such as the lost profit case. In other cases, the injured persons need to find a similar market for comparison and use the econometrics to infer influence of the anti-competitive behaviour on the price. In this part, the experience referring to the establishment of the non-infringement scenario will be discussed with the help of the economic evidence and the particularly important issues that should be considered as a standard by the court when adopting a method in the antitrust action.

### b. Overcharge

As regard the supra-competitive price caused by antitrust infringement, it is hard to determine the non-infringement scenario according to the agreement or the anti-competitive act. The non-infringement scenario is normally established by the difference-in-differences analysis, including the before-and/or-after method and yardstick method. Although it has been doubted whether economic and econometric analysis can satisfy the causation<sup>568</sup>, the German courts have already confirmed the application of it. In the *German cement cartel*, the expert appointed by the court submitted the econometric report on the causal link between the cartel and the overcharge, as well as the quantification. First of all, it should be noted that the econometric analysis of the causal link could be analogous to that of the quantification.<sup>569</sup> Secondly and more importantly, although the econometric analysis is an inference based on the data, which

<sup>567</sup> *Qihoo v. Tencent* [2013], Supreme People's Court of the People's Republic of China, *supra* n 143

<sup>568</sup> See Hanns A. Abele, Geog E. Kodek and Guido K. Schaefer, *supra* n 364, 847-869; Abele, Kodek and Schaefer indicated the gap between the legal and the economic standards of proving the causation and the damages. They mentioned that, in some complicated cases, an individual element within the alleged transaction cannot be identified in the litigation. What can be identified, according to the economic and econometric analysis, is the general tendency in prices based on the representative sample of data that is easier to be found than full data set. The authors suggested at least the '*stochastic causality*' as the legal standard to reconcile with the economic assessment of the 'general tendency', which can avoid the difficulties in evaluating individual elements.

<sup>569</sup> In Germany, the courts usually request the expert to prepare two reports on the causation and the quantification respectively so as to meet the different levels of standard of burden. Such a request cannot be found in Chinese court.

may lack an experimental basis, thus far it can still be deemed one of the most appropriate methods and can be applied in the cartel action. For example, observing the price change of cement before, during and after the cartel can be used to infer the likely connection between a dependence variable (e.g. the demand of cement) and the explanatory variables (e.g. the price of the cement), as well as the amount of the overcharge. In other words, it can tell which part of the rise of the cement price can be attributed to the cartel.

Furthermore, the judges in the court are faced with the need to make a decision among different methods submitted by parties. For example, in the German cement cartel, the model submitted by the expert appointed by the court used the before-and/or-after method to carry out the econometric analysis. The cost-based method and structural oligopoly modelling as alternative methods that were submitted by the expert of the defendant were not considered by the court.<sup>570</sup> Under such circumstances, the court ought to have assessed every possible method and given reasons for the application of a method, if the argument was plausible and logical.<sup>571</sup> In this case, the court failed to provide a reliable reason for not adopting other methods. In the literature, the necessary standards summarized from the *German cement cartel* include: trade-off between accuracy and practicality by *Friederiszick and Röller*<sup>572</sup>; reliability, objectivity and validity by *Frank and Lademann*<sup>573</sup>.

As a comparison, among the limited experience, the Chinese Supreme Court stated in the case *Qihoo v. Tencent* that ‘the review on the expert’s opinion should focus on whether there are sufficient facts or data as a basis of the opinion; whether the market research or economic method is reasonable and reliable; whether the relevant facts that may alter the market research or economic method are taken into account; and whether the expert has the diligent and cautious responsibility as the professional person’.<sup>574</sup> Briefly summing up the statement of the Supreme Court, ‘sufficient facts or data’, ‘reasonable and reliable research or method’, ‘crucial determinants’ and ‘diligent and cautious experts’ can be obtained as a preliminary standard. Moreover, in order to reach an unbiased conclusion, it is better for the court to cross-check several possible methods and to examine whether the final conclusion are accurate, reliable and consistent with the methods and data and whether all the possibilities have been comprehensively considered.<sup>575</sup>

### c. Lost profit: *Rainbow v. Johnson & Johnson*

As regards the lost profit, the Shanghai High Court confirmed the claim for loss of profit due to the illegal RPM agreement and recalculated the profit alleged by the claimant in case *Rainbow v. Johnson & Johnson*. In this case, the defendant *Johnson & Johnson* disqualified the

<sup>570</sup> See Niels Frank and Rainer P. Lademann, ‘Economic Evidence in Private Damage Claims: What Lessons can be Learned from the German Cement Cartel Case?’, *Journal of European Competition Law & Practice*, 2010, Vol.1, No. 4, 366

<sup>571</sup> See Jochen Burrichter and Thomas B. Paul, *supra* n 545, 197

<sup>572</sup> See Hans W. Friederiszick and Lars-Hendrik Röller, Quantification of Harm in Damages Actions for Antitrust Infringements: Insights from German Cartel Cases, *Journal of Competition Law & Economics*, 6(3), pp. 608-618; Friederiszick and Röller introduced the ‘three-step process’ for the testimony adopted in German cement cartel: ‘design’, ‘application’ and ‘robustness checks’. More importantly, the authors suggested that the ‘trade-off between accuracy and practicality’ should be exercised in choosing the appropriate method. The accuracy implies ‘the unbiased and precise estimation’, while the practicality refers to ‘the verifiable and transparent estimation within reasonable timeframe and with proportional resources’.

<sup>573</sup> See Niels Frank and Rainer P. Lademann, *supra* n 570, 365-366

<sup>574</sup> *Qihoo v. Tencent* [2013], Supreme People’s Court of the People’s Republic of China, *supra* n 143

<sup>575</sup> In case German cement cartel, the analysis submitted by expert appointed by German court was challenged by the Bundeskartellamt and the expert of defendant. The major dispute was on determining the phasing-out period. Both the expert of defendant and the Bundeskartellamt challenged the option of the phasing-out period submitted by the expert of the court. The different options may result in different consequences and therefore the cross-checking is imperative.

claimant as a distributor and refused to supply because the claimant *Rainbow* (the distributor) failed to follow the minimum resale price articles in the RPM agreement. *Rainbow* brought the antitrust actions for compensation against *Johnson & Johnson* before the Shanghai Intermediate Court and then appealed before the Shanghai High Court. On the determination of the lost profit suffered by *Rainbow*, the appellant *Rainbow* alleged the refusal to supply resulted in only 68% of the sales volume in 2008 that had been completed and it could be inferred that the appellant could have completed 100% of the sales volume of 2008 according to performance of the appellant during the past three years. The appellant quantified the amount of lost profit by the amount of the unfinished sales volume during 2008 multiplied by the profit margin (23%).<sup>576</sup> The Shanghai High Court confirmed the direct causal link between the RPM agreement and expected loss can be predicted by the former performance of the appellant. But the Court addressed that the average profit margin obtained by appellant was based on the illegal RPM agreement, which is inconsistent with the objectives of the competition law. Therefore, the Court adopted the profit margin of 16% that was based on the market price, wholesaler price, tax and the allocation of profit, rather than the 23% and ultimately awarded the appellant the lost profit ¥ 530,000 Yuan.

In this case, the non-infringement scenario and amount of damages are easily predictable under the content of the agreement and the performance of the injured persons. The Chinese court determined the likelihood of 100% sale volumes that would have been accomplished by *Rainbow* in 2008 relying on various factors such as its performance over the last three years, market structure, the market power of the *Johnson & Johnson* and substitutes, etc. As a comparison, the EU's Green Paper Staff working paper summed up three major methods on the calculation of lost profits: the earnings based approach, the market based valuation approach and the assets based valuation approach.<sup>577</sup> The earnings based approach, which is also the method adopted by the court in case *Rainbow*, calculates the profit by the '*income statement*' to establish the non-infringement scenario; the market based valuation approach by stock market value or the profits of other comparable undertakings (listed companies); and the assets based valuation approach by the balance sheet.<sup>578</sup> It should be noted that quantification of lost profit is not always as easy as the situation presented in *Rainbow*. For example, when it is a predatory act, the loss could be inconspicuous which may need multiple economic instruments to exercise the valuation. The Court of Justice allowed the national court a relatively large discretion on the quantification of lost profit in *Mulder and others v Council* by addressing that the quantification of the lost profit is '*an evaluation and assessment of complex economic data*'.<sup>579</sup> The valuation is based on '*a largely hypothetical nature*' and the national court should be allowed to exercise '*a broad discretion*' on the economic data.<sup>580</sup>

## 6. Summary

Substantiating the dominant position of the alleged offenders as well as the damages could be difficult for the court and the parties in antitrust litigation. The presumptions as to the rules to lighten the burden of proof on the claimant are necessary. On the one hand, as regarding the concrete analysis on the dominant position, it should be noted that multiple factors shall be taken into consideration and a high market share does not imply the dominance in a fast growing and innovative industry.

<sup>576</sup> On the contrary, the appellee *Johnson & Johnson* denied that the RPM agreement fell within the violation of AML and contested that such a loss was based on the normal contractual dispute, not the antitrust violation.

<sup>577</sup> Green Paper staff working paper, para 140-143

<sup>578</sup> Green Paper staff working paper, para 140-143

<sup>579</sup> Joined cases C-104/89 and C-37/90 *Mulder and others v Council* [2000] ECR I-203, para 79

<sup>580</sup> Joined cases C-104/89 and C-37/90 *Mulder and others v Council* [2000] ECR I-203, para 79

On the other hand, the difficulties in determining the causal link and quantifying the harm exist in establishing or finding a non-infringement scenario. Econometrics could be useful, but it also requests a large amount of data. The presumption on causal link in connection with cartel is imperative under such circumstance. Furthermore, the court may be confronted with different methods and a comprehensive consideration as well as cross-examination is significant.

#### **IV. Initial overcharges, passing-on overcharges and the standing of indirect purchasers**

##### **1. The passing-on debates**

###### **a. Current situation in the EU and China**

One of the common problems of private enforcement in both the EU and China is the indirect purchaser litigation. It is clear that both the EU and China confirmed the direct purchasers' right to compensation, including co-contractors' right to compensation. Conversely, the standing of indirect purchasers may be more controversial and two opposing arguments which have been discussed for decades are: (1) whether the passing-on overcharge suffered by indirect purchasers can be determined and quantified in the trial; (2) whether the standing of indirect purchasers will diminish the deterrence of the enforcement of competition law. In this part, these two arguments will be re-examined to see whether the EU is ready for the new indirect purchasers' litigation, whether the present EU model can be introduced into China and thus whether there are some unsolved problems for both the EU and China.<sup>581</sup>

Briefly summing up the current statement of the standing of indirect purchasers and passing-on defence in the EU and China introduced in the first and second Chapter, we can find different approaches. Firstly, in the EU, the present Directive explicitly chose the option which enables the standing of indirect purchasers to sue and permits the passing-on defence invoked by offenders against the direct purchasers. It is obvious that this option is consistent with the goal of compensation (Article 3), thereby the injured parties, regardless of direct or indirect purchasers.<sup>582</sup> It is also consistent with fairness consideration and the corrective justice. On the other hand, (assuming the overcharge can be apportioned or determined between direct and indirect purchasers in the trial), the multiple liability of the defendant can be largely avoided and the direct purchasers who did not suffer damages would not obtain the unjust enrichment.

Thus it seems that the Chinese Supreme Court adopted a vague attitude to the issue of the passing-on and standing of indirect purchasers. As regards the question whether indirect purchasers can bring an action before a court, it is clear that both the AML and the Judicial Interpretation on AML did not deny their right to sue. Simultaneously, the Chinese courts usually applied the broad interpretation of Article 119 CPL on the '*direct interest*', which can particularly can be found in the final judgment of case Feng Yongmin v. Fujian Provincial

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<sup>581</sup> Indirect purchasers are defined as one of the five groups of the injured persons of the cartel which was categorized by Connor (2000). Of course, apart from the horizontal agreement, the fact that the overcharge will be passed through the distribution chain could also be due to the abuse of the dominant position. In this part, our discussion will be based on the simplest cartel that is constituted with three stages of the distribution chain (only one stage of indirect purchasers), i.e. producers (as cartelists), direct purchasers (wholesaler for example) and the customers of the direct purchasers (as indirect purchasers). It can be illustrated as below: cartelist → direct purchasers → indirect purchasers.

<sup>582</sup> See Christian Kersting, *supra* n 273, 260

Expressway Company Ltd.. In this case, the Fujian High Court indicated that ‘*the court of first instance affirmed that victims in this case could be competitors, customers, consumers.... All these people can be defined as having direct interest according to Article 119 of CPL only if their right has been harmed by the defendant’s behaviour*’.<sup>583</sup> Basically, the Chinese court adopts an affirmative position on the standing of indirect purchasers, which can be found in such broad interpretation and also in a study from the Beijing court.<sup>584</sup>

In addition to that, a lack of a clear determination of the standing of indirect purchasers in law is noticeable, as is an indirect purchasers’ action in reality. On the other hand, as regards the passing-on defence, the provisions of the passing-on defence (Article 10) in the Solicit Opinion on Draft of the Judicial Interpretation on AML (2011) can somewhat reflect the preliminary proposition of the Supreme Court. It explicitly addressed that ‘*the defendant who alleged that the injured persons have already passed on the loss wholly or partly to others shall bear the burden of proof*.’ Regrettably, this Article was removed in the formal Judicial Interpretation for one possible reason that the answer to the question should be left for future judicial practice, namely the answer could be gained from the individual cases.<sup>585</sup> In sum, there is a loophole in the issues the standing of indirect purchasers and the passing-on defence. But according to the discussion above, it can be presumed that basically the indirect purchasers can acquire the standing before the Chinese Court, which of course still needs to wait for the first one indirect purchasers’ action and future judicial practice.

In brief, the major arguments concerning the standing of indirect purchasers and passing-on defence that will be discussed in this paper include: (1) whether the rebuttable presumption can be justified; (2) whether the difficulties in the distribution of the damages between direct and indirect purchasers can be overcome; (3) whether duplicative liabilities can be avoided.

## **b. Opposite proposition: Illinois Brick rule**

The opposing proposition of the Directive is the Illinois Brick rule which denied the standing of indirect purchasers and the passing-on defence. The Illinois Brick rule was readily confirmed by two important cases in the US, *Hanover Shoe* (1968) and *Illinois Brick* (1977) respectively.<sup>586</sup> Certainly, the American indirect purchasers’ litigation does not fall within the scope of our discussion. But the arguments questioned in the *Illinois Brick* case and the subsequent literatures can help us to examine whether the current indirect purchasers’ provisions in the Directive of the EU are appropriate and workable, whether there are some unsolved problems for the national law of member states and whether the EU model deserves to be introduced in China in the near future.

<sup>583</sup> Case Feng Yongmin v. Fujian Provincial Expressway Company Ltd., the Judgment of Fujian High Court, (2012) 闽民终字第884号【(2012) minminzhongzi No.884】, available at: [http://210.37.32.28:8088/Fulltext/fulltext\\_form.aspx?Db=pfnl&Gid=118875819&EncodingName=gb2312](http://210.37.32.28:8088/Fulltext/fulltext_form.aspx?Db=pfnl&Gid=118875819&EncodingName=gb2312)

<sup>584</sup> See Rui Chen et al, Beijing first intermediate People’s Court IPRs tribunal, The Determination of Standing of Litigants in Antitrust Civil Action, (反垄断民事诉讼当事人主体资格的确定, fanlongduan minshi susong zhuti zige de queding), *The People’s Judicature* (Application), 17.2009, 21-27

<sup>585</sup> This opinion was mentioned particularly by Zhu Li (who was the Judge of IPR Tribunal of the Chinese Supreme Court then) in the Conference Innovation and Competition Policy in the IT Sector (a conference co-sponsored by the EU-China Trade Project[II] and Electronic Intellectual Property Center, Ministry of Industry and IT, PRC) in 2012. It is interesting that in his presentation, he confirmed the standing of indirect purchasers in antitrust action in China and underlined that the excessive litigation will not happen without treble damages and with the difficulty in proving. He also added that the causal links of indirect purchasers should not be too remote due to the actual loss standard. The document can be found in: <http://www.euchinacomp.org/attachments/article/170/PPT4-Zhu%20Li-EN.pdf>

<sup>586</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 482 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

Firstly, the history of the Illinois Brick rule should be reviewed to introduce the major arguments we needed to re-examine the issue. In 1968, the American Supreme Court banned the passing-on defence being invoked by the defendant in the case *Hanover Shoe*. Hanover Shoe is a shoe manufacturer, which claimed treble damages against the shoe machinery corporation United's, alleging that their leasing and refusing to sell practices violated §2 of the Sherman Act.<sup>587</sup> The defendant attempted to invoke a passing-on defence but failed. The American Supreme Court rejected this passing-on defence by addressing that it would cause a complicated problem in the action and the under-deterrence of the private action. The Supreme Court stated that '*a wide range of factors influence a company's pricing policies*' and '*costs per unit for a different volume of total sales are hard to estimate*'.<sup>588</sup> It is not clear whether the price rise is the result of the passing-on overcharges. Furthermore, the Supreme Court doubted whether the real indirect purchaser is an efficient enforcer by indicating that '*the ultimate consumers, the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit, and little interest in attempting class action*'.<sup>589</sup> In the 1977 Illinois Brick case, the major dispute was whether indirect purchasers can rely on the overcharge sustained by them to bring damage action against the defendant Illinois Brick.<sup>590</sup> The Supreme Court firstly indicated that the passing-on rule should be '*applied equally to plaintiffs and defendants*', which implied that if indirect purchasers were allowed to sue for loss, *Hanover Shoe* should be overruled.<sup>591</sup> Otherwise, the defendant may be faced with the risk of duplicative liability due to successive claims from direct and indirect purchasers. In addition, the Supreme Court reaffirmed that the standing of everyone in the distribution chain may bring complicated problems to the action because the court needed to determine the price '*in the real economic world, rather than an economist's hypothetical model*'.<sup>592</sup> The standing of indirect purchasers probably means that it is necessary to '*trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer*'.<sup>593</sup> The time and costs of the litigation cannot afford this process. Ultimately, the Supreme Court declined to award the indirect purchaser with the standing to sue and went to address that if not, '*the effectiveness of the antitrust treble damages action would be substantially reduced*'.<sup>594</sup> The background of the Illinois Brick case is the optimal deterrence which highlights the significance of the deterrence goal, rather than the compensation in a private action.

In the case Illinois Brick, two primary arguments were brought by the American Supreme Court, i.e. whether indirect purchaser litigation is workable in trial; whether indirect purchasers litigation would impair the deterrence of the enforcement of antitrust law. We will examine these two arguments below to see whether the courts in EU member states have enough weapons to deal with them and then whether the deterrent effect of the enforcement of EU competition law will be undermined by indirect purchaser litigation, including the problems of multiple liabilities.<sup>595</sup>

<sup>587</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 482 (1968)

<sup>588</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 482 (1968), 492, 493.

<sup>589</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 482 (1968), 494.

<sup>590</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

<sup>591</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 728

<sup>592</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 732

<sup>593</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 741

<sup>594</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 729

<sup>595</sup> 490 U.S. 93 (1989); After the Illinois Brick judgment has been made, a lot of states in US overturned the Illinois Brick rule in their state statutes and conferred indirect purchasers with standing to sue, which were deemed as 'Illinois Brick repealer'. Following that, the US Supreme Court stated in case *California v. ARC America Corp.* that federal law does not pre-empt these 'Illinois Brick repealer' state statutes. In addition, there are two exceptions to Illinois Brick rule which were recognized by the Supreme Court and the Ninth Circuit subsequently: 'the pre-existing cost-plus contract' and 'the own or control'. If 'the cost-plus contract' was concluded between direct and indirect purchaser before the overcharge was paid by direct purchaser to the violator. Under such circumstance, it is not difficult to determine whether indirect purchasers have suffered the overcharge. Likewise, the market structure and the position of the buyer in the market have little influence on the pricing, which is relatively simple compared with other pricing methods. On the other hand, if the violator owns or controls the direct purchaser so that they have 'no realistic possibility to sue' in any event, the indirect purchaser should have the standing to sue. See Cynthia Urda

## 2. Justification of the rebuttable presumption

The rebuttable presumption created in Article 14(2) of the EU Directive so as to lighten the burden of proof on indirect purchasers regarding the causation and existence of passing-on overcharge can be justified on the ground that: (1) relatively high probabilities that indirect purchasers (especially final consumers) sustained the overcharge; (2) the difficulties of production of proof by final consumers.

### a. High probabilities of passing-on overcharges

Firstly, as regards the probabilities of the overcharge suffered by indirect purchasers, especially final consumers were discussed excessively in literatures. A most persuasive and mainstream argument was analysed by *Harris* and *Sullivan* who rebutted the position in case the *Illinois Brick* stating that indirect purchasers often bear ‘a tiny interest’ and indicated that both in theory or the real world, indirect purchasers actually suffered most of the overcharges. Following the *Illinois Brick* decision, *Posner* and *Landes* (1979) opined that when the direct purchasers suffered a 10% overcharge, the amount of overcharge undertaken by indirect purchasers is less than 1% which is ‘a negligible increase in price’.<sup>596</sup> In contrast, *Harris* and *Sullivan* discussed the pricing structure of intermediate purchasers both under the profit-maximizing and the cost-plus / mark-up pricing.<sup>597</sup> Briefly summing up their conclusion, under the economic assumption of profit-maximizing, whether intermediate purchasers would pass on the overcharge to their customers depends in the first place on whether the overcharge is a fixed or variable cost and then the elasticity of demand and supply of the intermediate purchasers.<sup>598</sup> The elasticity of supply determines whether the passing-on would occur, while the elasticity of demand influences the amount of the passing-on overcharge. They further discussed the connection between the elasticities of demand and supply of the intermediate purchasers in the monopoly market with the successful cartel and indicated that the cartel’s profit is generated from the less elastic demand of the intermediate.<sup>599</sup> Under such circumstance, the two extreme scenarios – perfectly elastic demand and perfectly inelastic supply - that create no passing-on overcharge are unlikely to occur. Moreover, considering the duration of the cartel (or monopoly) and antitrust litigation, the estimation of elasticity generally does not depend on the short term. In the long run, participants of the market would have more opportunities to find a substitute or alter their strategies and both the supply and demand always tend to be more elastic. Therefore,

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Kassis, The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to *Illinois Brick*, 32 Am. U. L. Rev. 1087, 1982-1983, 1102; another disputable exception is ‘the co-conspirator’. It was recognized in case by the Ninth Circuit; *Kansas v. Utilicorp United* 497 U.S. 199 (1990)

<sup>596</sup> See William M. Landes and Richard A. Posner, ‘Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*’, *The University of Chicago Law Review*, Vol. 46, No. 3 (Spring, 1979), 617

<sup>597</sup> See Robert G. Harris and Lawrence A. Sullivan, ‘Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis’, *University of Pennsylvania Law Review* Vol. 128 No.2 1979, 269-360

<sup>598</sup> See Robert G. Harris and Lawrence A. Sullivan, *supra* n 597, 269-287; the authors stated that when it is a fixed cost, it is useless to change the quantity of products so as to reduce the costs because the marginal cost is unchanged. In the short-term, therefore, no passing-on will occur under the overcharge as the fixed cost, such as rent or cost of machines. When it is a variable cost, such as flour or sugar to the baker, elasticities of demand and supply of the intermediate purchasers play vital roles on the short-run pricing.

<sup>599</sup> See Robert G. Harris and Lawrence A. Sullivan, *supra* n 597, 285; The authors assessed four extreme scenarios and specified that, in the competitive market, the pass-on rate is zero under the perfectly elastic demand and perfectly inelastic supply, whereas the overcharge will be fully passed on to their customers under perfectly elastic supply and perfectly inelastic demand.

under profit-maximizing, indirect purchasers especially the final consumers are very likely to suffer overcharges passed on to them both in the short and long run.

In the real world, the undertakings pricing their products usually do not consciously take profit-maximizing into account, although they must realize it unknowingly so as to survive in the competitive industry. *Harris* and *Sullivan* also analysed that, under the practical pricing method like cost-plus or mark-up, indirect purchasers will also highly possibly sustain the passing-on overcharge.<sup>600</sup> Under such circumstances, the competition may force the undertakings to pass on the overcharge, in the long run.

## **b. Lightening the burden of proof of indirect purchasers**

As discussed above, the stand-alone antitrust litigation usually requires the claimants to submit a large amount of evidence and data on proving the infringement and causation. Even in the follow-on action, the claimants still need sufficient evidence to establish the causation between the illegal practice and the damages. Generally speaking, direct purchasers who are usually repeated purchasers<sup>601</sup> or commercial partners and have a direct contractual relationship with violators are more efficient enforcers than indirect purchasers in respect to evidence and data obtained. But this argument cannot justify the exclusive standing of direct purchasers because there are actually several procedural devices that can alleviate the difficulties faced by indirect purchasers on the evidence. The disclosure of evidence from rivals or other parties may to some extent lighten the information asymmetry in the litigation. Apart from that, the presumption in Article 14(2) is also an important procedural device to lighten these difficulties of indirect purchasers on evidence.

## **3. The theory of Pass-on: proving the causation and quantifying the overcharge**

In an indirect purchaser litigation, if only the claimant successfully satisfies the preconditions of the presumption laid down in Article 14(2) of the Directive, it is for the defendant to show that there is the possibility of some other circumstances that will influence the overcharge suffered by indirect purchasers.<sup>602</sup> The rebut allegation purported by defendant could be that there is no initial overcharge caused by the cartel (though it is unlikely) or there are other circumstances that may probably be responsible for the loss so that the presumption should not be applied. When the defendant succeeds to establish the possibility, the presumption will not be applied and the claimant still needs to produce evidence and facts relating to the proving the causation.

In the traditional tort law, the crucial factor of the causation is to determine that the rise of price for intermediate purchasers results from the cartel (or abuse of dominance) committed by the defendants, not from the other facts, namely the 'but-for' test. Therefore, the cost structure of intermediate purchasers is significant for determining the causation and damages. In antitrust actions, proving the causation is usually closely connected to the establishment of the occurrence of damages suffered by claimants and also with the quantification, especially from the perspective of the economic assessment.<sup>603</sup> As discussed above, the differences are, the court usually requests an extremely high legal standard on proving causation (99.9% probability)

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<sup>600</sup> See Robert G. Harris and Lawrence A. Sullivan, *supra* n 597, 299-331

<sup>601</sup> See George J. Benston, 'Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the Illinois Brick Rule', *Antitrust Law Journal* (1986), 234-235

<sup>602</sup> Joint Cases C-295/04 to C-298/04, *Manfredi and Others* [2006] EUR I-06619, paras 63-64

<sup>603</sup> see Jochen Burrichter and Thomas B. Paul, *supra* n 545, 203

and a relatively low standard for the quantification. It is not clear whether the remote indirect purchasers are capable of satisfying the strict standard of causation under the present limited experience.

Roughly summing up the contribution from the literatures and settled cases, such as the *Spanish sugar cartel*, there are actually several basic questions that needed to be examined in the trial to assist the judge in his determination of causation and overcharge having been passed on to indirect purchasers. In the first place, the structure of distribution chain should be examined, including the definition of the layers of direct purchasers, other intermediate purchasers and final consumers. Both direct purchasers and other intermediate purchasers are able to pass on the overcharge downstream. Generally, it is not very troublesome to define direct purchasers, other intermediate purchasers and final consumers in a litigation. Moreover, a deeper examination of the components of the structure of distribution chain is essential because the structure of distribution chain may be different when the cartel product that was brought by intermediate purchasers was used to resell or reproduce. The general pricing strategy of retailers could be the wholesaler-price plus a fixed or proportional mark-up. But if the intermediate purchaser is a manufacturer who bought the cartel product to reproduce it, the passing-on overcharge that occurred may depend on various factors, such as fix or variable cost, demand or supply elasticity. Therefore, it is a necessary precondition for the litigation that the distribution chain and the transaction relation can be identified.

Secondly, the possibilities of the passing-on overcharge can be roughly estimated under certain circumstance. The estimation of the possibilities of the passing-on overcharge is meaningful at least for invoking or rebutting the passing on defence. The estimation could also incentivise the settlement between litigants before and during the litigation in the meantime. The tax incidence theory is one of the most important instruments, which has frequently been applied in US class action by the expert witness to identify the common proof of impact and method of proving harm during the certification stage.<sup>604</sup> It studies the tax that splits between the producer and the consumer in a perfectly competitive market with the calculation of elasticity and addressed that the passing-on overcharge (that is analogous to the tax) does not occur under two extreme scenarios. Firstly, in a perfectly competitive market, when the demand elasticity is perfectly elastic, the intermediate purchaser cannot raise their price, otherwise they will lose all their sales. *Harris* and *Sullivan* mentioned that the cartel is unprofitable under such a scenario because the high elasticity of demand of an intermediate purchaser may result in a high elasticity of demand of the producer.<sup>605</sup> The second extreme scenario is under perfectly inelastic supply where the intermediate purchaser cannot change the output so as to increase its price, which rarely happens in the real world.<sup>606</sup> However, according to the settled cases of indirect purchasers class action in the US, both the '*sanguine*' and the '*sceptical*' views were adopted by courts on the reliability of the tax incidence. Some with '*sanguine*' position found that it is sufficiently plausible for certification and show that passing-on is inevitable.<sup>607</sup> The '*sceptical*' opinion doubted the practical effect of tax incidence because it is based on a perfectly competitive market which seldom exists in reality and the operation of market is not always like the hypothetical model submitted by experts.<sup>608</sup> For the market in the real world with practical commercial pricing, *Harris* and *Sullivan* indicated five classes of factors that are

<sup>604</sup> See Chris S. Coutroulis, D. Matthew Allen, *The Passing-on Problem in Indirect Purchaser Class Litigation*, 44 *Antitrust Bull.*, 1999, 180,184

<sup>605</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 597, 289; the similar sentiment held by Schaefer, see Elmer J. Schaefer, 'Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis', *William and Mary Law Review* Vol.16:883, 897-899

<sup>606</sup> Harris and Sullivan addressed such scenario may occur on the transaction of antique and work of art, such as 'Picasso paintings', that the output is limited. See Robert G. Harris, Lawrence A. Sullivan, *supra* n 597, 289-290

<sup>607</sup> See John E. Lopatka, William H. Page, 'Indirect Purchaser Suits and the Consumer Interest', 48 *The Antitrust Bull.*, 2003, 544; see William H. Page, 'Class Certification in the Microsoft Indirect Purchaser Litigation', *Journal of Competition Law and Economics* 1(2), 303-338

<sup>608</sup> See William H. Page, 'The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick', *Antitrust Law Journal* Vol.67 No.1, 1999, pp.23-27; see John E. Lopatka, William H. Page, *supra* n 607, 545

essential for the estimation of pass-on rate, including temporal factors, pricing factors, directness of cost factors, supply factors and demand factors.<sup>609</sup> To be specific, the frequency of price changes and the duration of cartel determine the frequency of and likelihood of the passing-on overcharge respectively. When the intermediate purchaser employs a fixed markup, the pass-on rate could be 100%; conversely, when the intermediate purchaser relies more on the cost of cartel product in setting the price, the pass-on rate could be more likely to be less than 100% in the short term. The initial overcharge that is spent on direct cost (cost of production) or indirect cost (such as cost spent on freight) may influence the change and the size of pass-on rate. Ultimately, the elasticities of demand and supply which implies the substitution in the market undoubtedly play a vital role in producing the pass-on rate. For example, as discussed above, if the intermediate purchasers bought the cartel product under the cost-plus contract with fixed quantity and fixed mark-up, the overcharge is very likely passed on downstream.<sup>610</sup> Or if the demand of the (intermediate purchaser's) product is inelastic and the cartel product only constitutes a small portion of the product of intermediate purchaser, the overcharge is more likely to be passed on to the final consumer. The market power of intermediate purchasers is also significant. Generally speaking, with a successful cartel, the intermediate purchasers and the final consumers would probably do not have great market power. But if the final consumers have a greater market power, the passing-on overcharge would very likely be absorbed by the intermediate purchasers. In addition, apart from five classes of factors, the pricing strategies of intermediate purchasers that are upstream undertakings of the claimant should also be examined. For instance, in the retail market, apart from the basic '*wholesaler price plus a mark-up*' pricing, various pricing strategies including promotion actually exist, like '*every-low-price*', '*high-low-price*', '*focal pricing*' and '*loss leader*'.<sup>611</sup> These promotions also influence the price setting, especially for the multi-product manufacturers who may allocate their cost to several products. The historic information related to the pricing strategies of intermediate purchaser plays a vital role in tracing the overcharge along the distribution chain.

Thirdly, on the concrete calculation of the passing-on overcharge, the US Supreme Court opined it is an insurmountable task for the judicial system in the case *Hanover Shoe*. *Bulst* has once addressed that '*there seems to be no reported court decision, neither in the United States, the United Kingdom, France nor Germany, in which a court calculated or estimated the amount of an overcharge passed on to an intermediate purchaser.*'<sup>612</sup> In past decades, literatures attempted to study the economic and econometric tools for the quantification. *Hellwig* distinguished three different effects of the change in the intermediate purchaser's profit due to the rise of input price, including per unit revenue, business-loss effect and cost effect.<sup>613</sup>

<sup>609</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 597, 317-320; other studies include Robert Cooter who stated the significance of substitution in the factor market. The existing of the passing-on overcharge depends on whether the substitution is easy to find in the market, which further depends on the technical characteristics of the industry and time. *Viton* and *Winston* submitted a hypothetical welfare analysis (without the empirical evidence) and further concluded that the Illinois Brick rule would result in an increase of the social welfare. *Werden* and *Schwartz* attempted to discuss the deterrent effect generated from the different models of direct and indirect purchasers' standing. They summarized that although the Illinois Brick rule is not perfect, it is appropriate under the condition that the treble-damages action is the major weapon for creating the deterrent effect. See Robert Cooter, 'Passing on the Monopoly Overcharge: A Further Comment on Economic Theory', *University of Pennsylvania Law Review*, Vol. 129, 1981, 1523-1532; See Philip A. Viton, Clifford M. Winston, 'Passing on the Monopoly Overcharge: The Welfare Implications', *University of Pennsylvania Law Review*, Vol. 129, No. 6 (Jun., 1981), 1516-1522; See Gregory J. Werden and Marius Schwartz, 'Illinois Brick and the Deterrence of Antitrust Violations – An Economic Analysis', 35 *Hastings L.J.* 629-668, 1983-1984

<sup>610</sup> See Herbert Hovenkamp, 'The Indirect-Purchaser Rule and Cost-Plus Sales', *Harvard Law Review* Vol.103:1717, 1720

<sup>611</sup> See Samid Hussain, Daniel M. Garrett, Vandy M. Howell, 'Economics of Class Certification in Indirect purchaser Antitrust Cases', *The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California* Vol.10 No.10 Summer/Fall 2001, 40-46

<sup>612</sup> See Friedrich Wenzel Bulst, 'Private Antitrust Enforcement at a Roundabout', *European Business Organization Law* 7(2006), 738

<sup>613</sup> See Martin Hellwig, Private Damage Claim and the Passing-on Defense in Horizontal Price-Fixing Cases: An Economist's Perspective, working paper, Max Planck Institute, Bonn, Germany, 1-29

Verboven and van Dijk (2007) attempted to study the discount to the overcharge suffered by direct purchasers in the three-level distribution chain (i.e. producers as cartelists, direct purchasers and indirect purchasers).<sup>614</sup> They further relied on their theory to calculate the discount to the overcharge sustained by premixers in a European vitamin cartel case based on the assumptions regarding the competition and the market share of the premixers.<sup>615</sup> Boone and Müller presented a model to calculate the damages suffered by the final consumer in the three-level distribution chain under different market structures.<sup>616</sup> They suggested such a three-level model can also be applied in the distribution chain of four or more than four levels repeatedly.<sup>617</sup>

In practice, the two basic approaches mentioned in the Practical guide on quantifying harm can be used as cross-checking in the action, namely comparing the actual price and *but-for* price, as well as estimating the pass-on rate.<sup>618</sup> Generally speaking, a certain industry may have a standard and specific pricing strategy. Therefore, a large amount of detailed information and data should be taken into account when assessing the overcharge. For example, as regards the cartelized product that is used to resell, assuming the three-level distribution chain consisting of manufacturer, retailer and consumer, the price of retailer may commonly be based on the wholesaler-price plus a fixed mark-up. The overcharge may be passed through within the wholesaler-price of the cartelized product wholly or proportionally allocated among multiple products of the cartel. The wholesaler-price and the mark-up should be examined respectively before and/or after the cartel (or refer to the data of a similar market without cartel). If the data are available, econometric techniques should be applied to calculate the elasticity and the pass-on rate of the wholesaler layer.<sup>619</sup> A more accurate amount of damages can be obtained by means of cross-checking the results from the before-and/or-after (or yardstick) method and from the pass-on rate. Moreover, if the cartelized product is used to re-manufacture, apart from the pass-on rate, it is more important to review the extent to which the price of cartel accounted for the final product and whether there is other price fluctuation within the input of final product, which were essential for the causation of the passing-on. For example, in *Spanish sugar cartel*, the cost-based approach was applied to quantify the damages of the cartel, by which the price of beet which accounts for 58% of the input of sugar has been examined throughout the cartel period to figure out whether the price of sugar was influenced by the input or the cartel.<sup>620</sup>

Of course, both of the two approaches have their limitations and deficiencies. The econometric assessment of elasticity needs vast amounts of data that can hardly be obtained in some cases. On the other hand, it is occasionally difficult to find a market to use as a reference, or to define

<sup>614</sup> See Frank Verboven, Theon van Dijk, Cartel Damages Claims and the Passing-on Defense, *The Journal of Industrial Economics*, Vol.57, No.3 (Sep., 2009), 457-491

<sup>615</sup> See Frank Verboven and Theon van Dijk, *supra* n 614, 481-483

<sup>616</sup> See Jan Boone and Wieland Müller, The Distribution of Harm in Price-Fixing Cases, *International Journal of Industrial Organization* 30 (2012), 265-276

<sup>617</sup> See Jan Boone and Wieland Müller, *supra* n 616, 275-276

<sup>618</sup> Oxera Consulting used a classification of methods and models including three levels, i.e. identifying the approach, identifying the counterfactual basis and the detailed estimation techniques. The three methods and models are comparator-based (including cross-sectional comparison, time series comparison and difference-in-difference), financial-analysis-based (using the financial information on comparator firms and industries, cost of capital and cost plus) and market-structure-based (using theoretical models like Gournot or Bertrand).

<sup>619</sup> Landes and Posner indicated the formula of share of recovery received by indirect purchasers  $1 - \lambda = \frac{e^s}{e^s + e^d}$ , in which  $e^s$  and  $e^d$  represent the elasticity of supply and demand. As a comparison, the formula of the pass-on rate was simply stated by Verboven and van Dijk as  $\tau = \frac{1}{1 + \varepsilon\omega}$ , in which  $\omega$  denotes the responsiveness of marginal cost to an output increase and  $\varepsilon$  represents the absolute value of the price elasticity of demand in perfectly competitive market. In the imperfectly competitive market, the pass-on rate is  $\tau = \frac{1}{1 + \varepsilon\omega + (\eta - 1)/(\varepsilon N)}$ , in which  $\eta$  represents the curvature of demand and  $N$  is the number of firms in the industry. See William M. Landes, Richard A. Posner, *supra* n 597, 618; See Theon van Dijk, Frank Verboven, 'Quantification of Damages', in 3 Issue in *Competition Law and Policy* 2331 (ABA Section of Antitrust Law 2008), 2342-2343

<sup>620</sup> see Francisco Marco, 'Damages Claims in the Spanish Sugar Cartel', *Journal of Antitrust Enforcement* 2015 3 (1), 205-225

the accurate duration of the cartel in the approach of comparing the actual price and the *but-for* price, no matter whether under the before-and-after or yardstick method. Sometimes, the duration of the cartel is hard to specify. For example, in *German cement cartel*, one of the major disagreements between the expert appointed by the court and defendant was the reference period. The defendant questioned the existence of the phasing-out period of the price war after the cartel, which impacted the setting of reference period, and suggested to extend the phasing-out period.<sup>621</sup> Regrettably, the German court did not adopt another method as the cross-checking.<sup>622</sup>

#### 4. Duplicative liability

Harris and Sullivan distinguished two different conceptions in their paper, ‘*the duplicative liability*’ and ‘*the excessive liability*’.<sup>623</sup> They defined ‘*the duplicative liability*’ as ‘*liability of the violator due to several purchasers from two or more vertical levels of the distribution chain beginning with the same direct purchasers*’.<sup>624</sup> ‘*The excessive liability*’ referred to the compensation that is more than the statutory damages burdened by the defendant.<sup>625</sup> The term used in the EU Directive is ‘*multiple liability*’ and did not provide its implication. For a more precise discussion, the ‘*duplicative liability*’ will be used below. The possibility of the duplicative liability is doubtful based on the present limited experience of indirect purchaser litigation. Some literatures mentioned it is a ‘*chimera*’ that would not happen in the real world.<sup>626</sup> Some stated further that even the duplicative liability is inevitable; it is still consistent with goals of compensation and deterrence.<sup>627</sup>

Some argued that the presumption (Article 14(2)) may increase the risk of duplicative liability when the violators cannot rebut the presumption against indirect purchasers and in the meantime cannot prove the passing-on defence against direct purchasers successfully.<sup>628</sup> Based on the current limited experience in indirect purchasers’ litigations it is hard to tell whether or to what extent such a risk exists. In fact, there are several procedural devices that can alleviate the worry regarding the risk of ‘*duplicative liability*’, such as consolidated actions of direct and indirect purchasers, *res judicata* or collateral estoppel.<sup>629</sup> The current EU Directive provides a rule that requests the Member States to ensure that national courts to consider the precedent actions and judgments against the same infringement so as to avoid the duplicative liability.<sup>630</sup> Regulation (EC) No 44/2001 (Brussels I) provided the basic rules governing the recognition of the judgment by the court of other Member States.<sup>631</sup> Apart from this rule, some consolidated procedural devices were proposed as flexible tools for the consistent direct and indirect purchasers’ litigation. Consolidating the direct and indirect purchasers into one action can to some extent prevent the conflicting decisions and the possible risk of the duplicative liability

<sup>621</sup> See Niels Frank and Rainer P. Lademann, *supra* n 571, 363, 365

<sup>622</sup> The defendant virtually submitted ‘*the cost-based method and structural oligopoly modelling*’ that has not been considered by the court. See Niels Frank, Rainer P. Lademann, *supra* n 571, 366

<sup>623</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 596, 343-344

<sup>624</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 596, 344

<sup>625</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 596, 344

<sup>626</sup> See John E. Lopatka, William H. Page, *supra* n 607, 531-370

<sup>627</sup> see Elmer J. Schaefer, *supra* n 605, 932

<sup>628</sup> See Andreas Heinemann, *supra* n 325, 188; see Mario Siragusa, Private Damage Claims – Recent Developments in the Passing-on Defence, in: Hüschelrath and Schweitzer (eds.), Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives, (Springer-Verlag Berlin Heidelberg 2014), 314; see E. Rittenauer, K. Brückner, *supra* n 259, 308

<sup>629</sup> Harris and Sullivan mentioned the available procedural devices in US including the four-year limitation statute, transferred and consolidated trial, interpleader, escrow, *res judicata* and collateral estoppel. See Robert G. Harris, Lawrence A. Sullivan, *supra* n 597, 345-346;

<sup>630</sup> Article 15 of EU Directive

<sup>631</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 - 0023

from occurring. Furthermore, intermediate purchasers may probably possess most of the evidence relating to the passing-on overcharge so that joining the direct and indirect purchasers into one forum may help the court to clearly determine the facts and allocate the harms, which could be deemed an additional advantage of consolidated action.<sup>632</sup>

### a. Third-party notice in Germany

For lightening the risk of duplicative liability, German BGH suggested third-party notice (*Streitverkündung*) as an available instrument. BGH noted the third-party notice by indicating that *‘if it is not certain, to what extent the cartel overcharges were passed on to next market level, the wrongdoer can prevent duplicative claims by the third-party notice.... It is generally the case, because when direct purchaser won his process, the indirect purchaser alleged that the process (of direct purchaser) is not correctly determined and actually he in fact is the injured person who is granted the right.... The goal of the third-party notice, in the first place, is to avoid different decision on the same fact in interest of the declarants (Streitverkünders).*<sup>633</sup> Under the third-party notice, if the claims were brought by direct purchasers, indirect purchasers can join into the litigation under the third-party notice, and vice versa. BGH also noted that inherent difficulties in applying the third-party notice when the defendant did not know the remote purchasers or when the population of the remote purchasers especially the final consumers is too large to deal with.<sup>634</sup> It implies that no passing-on, small passing-on or fragmented passing-on overcharge, provided that no additional downstream purchasers appeared.<sup>635</sup>

Simultaneously, the literature also argued that neither the defendant nor direct purchasers would prefer to inform the indirect purchasers about the action.<sup>636</sup> Therefore, it is questionable whether the mandatory joinder of direct and indirect purchasers is necessary. Sometimes, even in one distribution chain beginning with one direct purchaser, the population of intermediate purchasers and final consumers could be incredible large.

### b. Consolidated damages report

*Rüggeberg* and *Schinkel* suggested an insightful and also somewhat bold procedural mechanism - a consolidated damages report as an instrument to overcome the difficulties of over-compensation and under-compensation in multi-purchasers litigation.<sup>637</sup> The consolidated damages report is created by the public competition authorities, such as Commission and national competition authorities that act as *amicus curiae* under Article 15(3) of Regulation 1/2003. To be specific, when the national court confirmed the infringement and determined liability in an action initiated by one (or several) of the purchasers, the competition authorities can submit the consolidated damages report as a written opinion on the quantification and distribution of damages. The competition authorities that have a better database on the direct and indirect purchasers’ litigations filed against the same infringement within one Member

<sup>632</sup> See Elmer J. Schaefer, *supra* n 605, 903

<sup>633</sup> BGH, *Urt. v. 28.06.2011 – KZR 75/10*, para 73

<sup>634</sup> BGH, *Urt. v. 28.06.2011 – KZR 75/10*, para 74

<sup>635</sup> BGH, *Urt. v. 28.06.2011 – KZR 75/10*, para 74

<sup>636</sup> See Christian Kersting, Sebastian Dworschak, *Zur Anspruchsberechtigung indirekter Abnehmer im Kartellrecht nach dem ORWI-Urteil des BGH – Zugleich Besprechung von BGH, Urteil v. 28.6.2011 – KZR 75/10*, *JZ* 15/16/2012, 780

<sup>637</sup> See Maarten Pieter Schinkel, Jakob Rüggeberg, *Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement*, *World Competition: Law and Economics Review* 29.3 (2006), 395-420

States or within the EU may form an expert team to assess the distribution chain and estimate the pass-on rate for every layer of the chain. The consolidated damages report can also be applied by sequential action (namely the litigation followed the stand-alone action initiated by one or several purchasers) as the overall estimation and distribution of damages against the same infringement.

Two doubts may be raised when examining the practicality of the *Rüggeberg* and *Schinkel*'s model. First of all, the consolidated damages report is based on assuming the competition authorities have better information on the distribution chain than the civil court, because several civil courts have transmitted all the documents they found in their action. But if this assumption does not exist, or if assuming one competition authority only received the request from one civil court and it is evident that there are other underlying victims whose information remains undetected, it is questionable whether the limited information can allow the competition authority to make a neutral and objective written observation under Article 15(3) that is no more than a legal and economic analysis based on facts transmitted by the civil court.<sup>638</sup> In other words, it is doubtful whether the observation based on limited facts from the first action can be applied in subsequent litigations. An additional question concerns itself with the role of this consolidated damages report played in private action. The written opinion under Article 15(3) of Regulation 1/2003 as assistance from public authorities is not a formal decision, which does not have a binding effect and cannot impair the independence of national court.<sup>639</sup> It is uncertain whether the effect of the consolidated damages report is greater than that of the reports submitted by the court-appointed experts or experts appointed by litigants. It follows that if some of civil courts applied the consolidated damages report, others not, under-compensation or over-compensation is still possible. Of course, if these difficulties can be overcome and the uncertainties can be eliminated or removed through further reform, the consolidated damages report could indeed be a useful and practical device in combatting the duplicative liability and facilitating the quantification in civil action. On the other hand, the public interest can be better safeguarded by means of observation submitted by public authorities in civil action.<sup>640</sup>

Apart from these, the impact report also introduced the German Musterfrage model as a mechanism that can consolidate the claims from purchasers on '*the same question of law or fact*'.<sup>641</sup> It permits all the claims on '*the same question of law or fact*' to be filed within a fixed period, meaning all the claims will be subsequently dealt with together by a higher court.

## 5. Limitation period: further adjustment?

It is questionable whether there is a need for modifying the statute limitation or create a special limitation rule when considering the possibility that indirect purchasers are willing to wait or intent on waiting for the result of direct purchasers' litigation before deciding to file their own claims, or vice versa. Assuming the scenario that direct purchasers brought an action and the related indirect purchasers are waiting for the final decision from the court on the determination of infringement so as to benefit from the '*free-riding*', it is doubtful whether the related limitation should be adjusted according to such a scenario. Of course, some literatures opined

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<sup>638</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O J C101/54, points 31-33

<sup>639</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O J C101/54, points 17,19

<sup>640</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/04, O J C101/54, points 19

<sup>641</sup> See Centre from European Policy Studies (CEPS) et al, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final report, Report for the European Commission DG COMP/2006/A3/012, 540

that the limitation can be used as a device to prevent the duplicative liability from occurring.<sup>642</sup> But a short limitation period is not consistent with the final goals of private enforcement – compensation and deterrence – and the protection of indirect purchasers especially the protection of final consumers’ the right to recovery. Moreover, a too short or too long limitation is not beneficial for achieving a deterrence of private action. The limitation should ensure the due time for litigants to produce evidence and avoid the possible errors on evidence as a result of an excessively lengthy period in the meantime.<sup>643</sup>

Assuming one distribution chain consisting of one infringer, one direct purchaser and one indirect purchaser, the antitrust action was initiated by a direct purchaser who knows more about the anti-competitive behaviour and damages better and part of the initial overcharges suffered were awarded to him. When the action was initiated, this indirect purchaser ‘*knows or can reasonably be expected to know the facts and behaviour of the infringement, the damages and the infringer*’, which implies the limitation starts to run.<sup>644</sup> Supposing one Member State ruled a total limitation period of 5 years pursuant to Article 10(3) of the current EU Directive, the risk of expiration of the limitation is very likely where the indirect purchaser are waiting for the result of the direct purchaser litigation (free-riding). The free-riding may benefit the subsequent action brought by the indirect purchaser who may have a chance to achieve a better settlement. Without a special adjustment of the limitation, it is also likely that the defendant infringer strategically abuses the procedure to delay the limitation in the initiating action so as to prevent the possible ‘*free-riding*’ and a better settlement in the subsequent claims. Furthermore, such an adjustment is necessary especially for the estimation of damages among the initiating and subsequent actions brought by direct and indirect purchasers against the same infringement.<sup>645</sup> Article 15 of the EU Directive requested that Member States to ensure that the national court is able to consider the final decision of initiating action ‘*from other levels in the supply chain*’ as well as damages from such a final decision so as to avoid the over-compensation and under-compensation. An appropriate limitation period may at least safeguard the likelihood of subsequent action. The assumption is also suitable for the direct purchaser litigation as subsequent action. Of course, one may worry about the disadvantages of the ‘*free-riding*’, i.e. neither direct nor indirect purchaser would be willing to initiate the action considering the cost on evidence. But it should be acknowledged that the ‘*free-riding*’ is actually an essential problem of concurrent direct and indirect purchasers in as much as any of them may hope to profit from the resource invested by the other.

Two alternative options as to adjustment of limitation are deserved to be discussed: first of all, suspension or interruption of the limitation which is somewhat analogous to that due to the public enforcement; secondly, a relatively long period for any subsequent action. The goals of this adjustment are to offer greater flexibility for mass injured persons to claim their loss on the one hand, and to avoid undue burden on the defendant as a result of an overlong period. In the first place, Article 10(4) of the EU Directive provided that limitation of the private action should be suspended or interrupted when the competition authorities initiate public enforcement. The suspension or interruption lasts at least one year following the final decision or termination of public enforcement.<sup>646</sup> Actually, prior to the EU Directive, the *Impact report* enumerated two available options: the first option ‘*German option*’ suggests that limitation is suspended when public enforcement (Section 33(5) GWB); secondly, there is the so-called ‘*Modified Spanish*

<sup>642</sup> See Robert G. Harris, Lawrence A. Sullivan, *supra* n 597, 345

<sup>643</sup> See Centre from European Policy Studies (CEPS) et al, *supra* n 641, 540

<sup>644</sup> Article 10(2) of EU Directive

<sup>645</sup> The similar opinion was mentioned in see Maarten Pieter Schinkel, Jakob Rüggeberg, Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement, *World Competition: Law and Economics Review* 29.3 (2006), 309

<sup>646</sup> Article 10(4) of EU Directive; Article 10 also governed the beginning of the limitation by stating that the limitation periods shall begin to run after ‘*the infringement of competition law has ceased*’ and ‘*the claimant knows, or can reasonably be expected to know of the behaviour or the fact of the infringement, to know of the fact of the harm caused by the infringement, or to know the identity of the infringer*’. The total limitation should be not less than 5 years.

*option*’ which creates a new limitation of 1 to 2 years after the final decision of public enforcement.<sup>647</sup> Apart from this, the Chinese Judicial Interpretation on AML chose a different route for the interruption of limitation due to public enforcement, which ruled that the claimant can enjoy interruption of limitation provided that his complaint concerns the anti-competitive behaviour. From the date that the claimant knew or ought to have known that the competition authorities did not accept the complaint, revoked acceptance of the case, or terminated the investigation, the limitation will be restarted.<sup>648</sup> Compared to the follow-on action of the public enforcement, direct and indirect purchaser litigation has a similar effect that can justify suspension or interruption, i.e. the limitation is likely to expire before the final decision has been made either by public authorities or by a civil court. Therefore, the limitation rule in the follow-on action can be deemed as a valuable reference. In the second place, the minimum limitation suggested in the EU Directive spans 5 years. Actually, according to the Staff Working Paper of Green Paper, the range of limitation among EU Member States varies from 1 to 30 years.<sup>649</sup> It implies that setting a long limitation period for direct and indirect purchasers’ action is possible in some of Member States. It is obviously that 5 years do not suffice for direct and indirect purchasers because the antitrust action generally lasts 3-5 years. It cannot be denied that a special rule on limitation may increase the uncertainty and complexity of the procedure and further impair the effectiveness of enforcement. Meanwhile, injured persons may not have a perfect information about the action brought by other injured persons against the same infringement. Setting a long period is a better option under such a consideration.

## 6. Indirect purchaser litigation in China: the future perspective?

As introduced above, doubts regarding indirect purchaser litigation mainly focus on the questions as to whether the causation can be determined and the overcharge can be traced and quantified. Such questions also include the distribution of overcharges between direct and indirect purchasers and the possibility of duplicative liability burdened by defendant, which not only exist in the EU, but also in China. In fact, these questions are not the insurmountable obstacles for the standing of indirect purchasers. The present EU Directive offers China an insightful model, which allows the standing of indirect purchasers and passing-on defence so as to ensure the compensation and avoid the unjust enrichment. But the provisions in the Directive only establish a basic framework for the indirect purchaser litigation. It requests further procedural reform, such as consolidating the direct and indirect purchaser litigation, or adjusts the limitation period to guarantee the possibility of subsequent action. For Chinese Solicit Opinion of the Judicial Interpretation on AML, there is a suggestion pertaining that the direct and the indirect purchaser litigation against the same infringement should be dealt with jointly.<sup>650</sup>

Besides, two different questions are frequently discussed in literature: whether the direct purchasers (or other intermediate purchasers) would be reluctant to sue due to the passing-on defence; whether final consumers who suffered mass and fragmented damages are able to bring a multi-claimant action. As regards the former, *Posner* and *Landes* firstly indicated the disincentive to claims brought by intermediate purchasers under the passing-on defence and under the unsatisfactory class action for damages in the US.<sup>651</sup> A similar opinion was held by *Benston* who stated intermediate producers who have better information about the cost of the

<sup>647</sup> See Centre from European Policy Studies (CEPS) et al, *supra* n 641, 539-540

<sup>648</sup> Article 16 of Judicial Interpretation on AML

<sup>649</sup> Green Paper staff working paper, para 265

<sup>650</sup> QBPC, Comments on *the Supreme People’s Court’s provisions on several questions of the application of law relating hearing the antitrust civil disputes (Solicit Opinion)*, available at [http://www.qbpc.org.cn/Tracy/2011%20Legal%20Committee/Draft%20AML\(20110429\)/QBPC%20Comments%20on%20the%20draft%20Anti-Monopoly%20Law%20\(20110526\).pdf](http://www.qbpc.org.cn/Tracy/2011%20Legal%20Committee/Draft%20AML(20110429)/QBPC%20Comments%20on%20the%20draft%20Anti-Monopoly%20Law%20(20110526).pdf)

<sup>651</sup> See William M. Landes, Richard A. Posner, *supra* n 596, 612

cartelized product and the real price may be discouraged by the passing-on defence.<sup>652</sup> A predominant opposing sentiment was proposed by *Mantell* who used the game theory to question the Illinois Brick rule by indicating special pre-conditions, i.e. if the number of indirect purchasers is ‘reasonably large’; and when the indirect purchasers are allowed to sue, the would-be violators might attempt to maximize his expected benefit.<sup>653</sup> *Werden* and *Schwartz* criticized the inference by *Posner* and *Landes* and opined that the Illinois Brick rule would not ensure the full compensation unless the recovery occurred before the conspiracy.<sup>654</sup> Despite various opinions, a basic ground for determining whether direct purchasers will bring the action, regardless of psychology and the business relationship, is the cost-benefit analysis. In fact, the passing-on defence does not imply that the direct purchasers suffered no damages. Even if they passed the whole overcharge on to their customers, the lost profit due to the decreased sales caused by the cartel should not be neglected. The passing-on defence cannot deny the existence of lost profit sustained by direct purchasers and cannot preclude their incentive to sue.

As regards the latter question, the so-called ‘multi-claimant action’ for damages, it should acknowledge that both EU Member States and China are lack these types of group litigation, such as class action, representative action or collective action. Following the theory of *Harris* and *Sullivan*, final consumers are the ones who suffered most of overcharges considering the long duration of cartel and litigation. One of the major types of ineffectiveness is the distribution of damages among the mass final consumers within the class. But it is still not an insurmountable task because there are several solutions for overcoming the difficulties of the distribution of damages. For example, section 34a of GWB in Germany provided a skimming off of benefit action that is brought by associations, by which the benefits claimed go to the Treasury. It can avoid the difficulties in assignment of low-valued damages between mass injured persons and also ensure the deterrence of the action. In addition, a fixed minimum of compensation per unit products, such as EUR 5 or 10, which was mentioned in the literature, may probably be an available tool.<sup>655</sup>

Briefly summing up, the indirect purchasers should be allowed with the standing to pursue their loss with the standing considering they are the real victims of the infringement. Meanwhile, awarding the defendant with the passing-on defence is consistent with the avoidance of unjust enrichment and over-compensation. But in practice, the most frequently studied controversies including the operability of indirect purchaser litigation (the causation and the quantification of damages), and preventing duplicative liability can be overcome by means of economic theory and procedural devise.

## V. Public and private enforcement

<sup>652</sup> See George J. Benston, *supra* n 601, 213-249

<sup>653</sup> Mantell established an inequality  $\frac{1}{1+x} < P_2 < \frac{1-P_1}{P_1} \times \frac{1}{y}$  to illustrate the room for the probability of indirect purchasers to sue. In this inequality,  $P_2$  denotes ‘the probability of at least one damages action brought by indirect purchasers. Mantell indicated that the probability of indirect purchasers to sue exists in the room between the left part  $\frac{1}{1+x}$  and the right part  $\frac{1-P_1}{P_1} \times \frac{1}{y}$ . It refutes the premise of Illinois Brick rule that indirect purchasers would not sue because of the tiny interest. ( $x$  denotes the recovery the violators need to pay if he loses the indirect purchasers litigation;  $P_1$  denotes the probability of at least one damages action brought by direct purchasers;  $y$  denotes the costs indirect purchasers needs to pay if they lose the action.) See Edmund H. Mantell, ‘Denial of A Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of Illinois Brick’, *Pace Law Review* 1982, Volume 2 Number 2, 176-193

<sup>654</sup> See Gregory J. Werden, Marius Schwartz, *supra* n 609, 638

<sup>655</sup> See Friedrich Wenzel Bulst, *supra* n 351, 323

## 1. Relationship of public and private enforcement

A common feature of the enforcement system in both the Union's and Chinese competition law is the dominant position of the public enforcement in the entire enforcement system. A range of problems may be given a rise as to how the public and private enforcement can be coordinated.

The first problem is the priority of private and public enforcement in this dual enforcement system. Some opinions state that the public enforcement should prevail over the private kind in both the EU and China. In the EU, some argued that the private action is initiated by private parties, which is motivated by pursuing of the private interest, whereas the public enforcement may focus more on the protection of the objectives of the competition law, i.e. the promotion of the integration of the market, efficiency and the workable competition. Some argued that the private action cannot serve at the protection of the competition norm (Institutionsschutztheorie), but only focuses on the protection of the individual (Individuenschutztheorie).<sup>656</sup> The Commission denied this in the Directive. The directive addresses the significance of the coordination of those two tools '*in a coherent manner*' so as to ensure '*maximum effectiveness of the competition rules*'.<sup>657</sup> In fact, when the civil court applies competition law, it cannot be denied that it will consider the objectives of the competition law, the public interest as well as the private parties' interest.<sup>658</sup> Likewise, the final decision of the civil court will inevitably have an effect on the market.

An important role played by private enforcement is the complementarity to public enforcement. Private enforcement provides injured persons with opportunities to pursue and obtain compensation. It can also contribute to the detecting unfounded violations and increase the overall sanction, which creates additional enforcement and raises the level of compliance. Furthermore, the private enforcement can complement the enforcement gap of the public enforcement, which is a decentralized decision-making process.<sup>659</sup> In China, the major doubts on the effectiveness of the private enforcement is on the obviously lack of the ample coordination between private and public enforcement.<sup>660</sup>

Private enforcement is independent from the public enforcement, which implies that no hierarchical relationship exists between public authorities and the private parties.<sup>661</sup> Public enforcement is not a pre-condition for initiating a private action. Both in China and the EU, the follow-on and stand-alone actions are available for injured persons. It extends to three crucial problems in respect to the interaction between public and private enforcement in the follow-on action: the binding effect (or probative value) of the decision of public enforcement in the litigation; the conflicts between the leniency program and disclosure; and reconciliation of the damages and fine.

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<sup>656</sup> See Assimakis P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?', *The Competition Law Review*, Volume 3 Issue 1, 2006, 14

<sup>657</sup> Directive, para (6)

<sup>658</sup> See Assimakis P. Komninos, *supra* n 656, 13

<sup>659</sup> See Assimakis P. Komninos, *supra* n 656, 11

<sup>660</sup> See Ding Guofeng, Wang Xiaolin, On Coordinated Path to Public Implementation and Private Implementation in our Country's Anti-monopoly Law (我国反垄断法中公共实施与私人实施的协调路径, *woguo fanlongduanfa zhong gonggong shishi yu siren shishi de xietiao lujin*), *Journal of Kunming University of Science and Technology*, Vol.11, No. 6, Dec. 2011, 29

<sup>661</sup> See Assimakis P. Komninos, *supra* n 656, 16; see Assimakis P. Komninos, Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight, *CMLR* 44: 1387-1428, 2007, 1423

## 2. Probative value of the decision of public authorities

When creating the private enforcement in a system with strong public enforcement, the first problem concerns the way in which to treat the final decision of the public authorities in the private action. In the EU, the probative value of the decision by public authorities including the decisions of the Commission and competition authorities in the private action is one of crucial questions raised from this cooperation. It is clear that the decision of the Commission has the strongest binding effect on the private action, which requests that the national courts ‘*cannot take decisions running counter to such finding of infringement*’.<sup>662</sup> The probative value of the final decision of the national authorities and national review courts is ‘*irrefutable*’.<sup>663</sup> The final decision of competition authorities and review courts of other Member States should be deemed as ‘*prima facie* evidence’.<sup>664</sup> In China, the final decisions of the NDRC and SAIC have no such binding effect on the courts. There is only one probability namely that the final decision of the administrative action may have a binding effect on the concurrent civil action on the same infringement. In the Solicit Opinion of the Judicial Interpretation (released by the Supreme Court as the preparatory work of the Judicial Interpretation on AML), there were two relative comprehensive provisions (Articles 11 and 15), including the binding effect of the final decision and the fact determined in the final decision, the effect of the commitment as well as non-infringement decision. Regrettably the final Judicial Interpretation adopted a conservative version and removed this Article.<sup>665</sup> Although removed, the standpoint in this Article can still provide some insights for the discussion.

*Article 11 The facts that have been confirmed by the valid decision from the People’s Court, if the litigants held the facts in the related antitrust private action, do not need to be proved, unless the rival parties have opposing evidence to rebut it.*

*The facts that have been confirmed by the final decisions on the monopolistic behaviour from the competition authorities, shall refer to the foregoing paragraph.*

*Where the competition authorities decided to suspend the investigation relying on the commitment submitted by the undertaking, this commitment of the undertaking shall not be used to infer the existence of the monopolistic behaviour directly.*

*Article 15 Provided the alleged monopolistic behaviour has been investigated by the competition authorities but has been not found illegal, the People’s Court shall review the claims of the litigants comprehensively and make the final decision.*<sup>666</sup>

### a. Advantages and controversies

A strong probative value of the public decision ensures consistent enforcement of the competition law by the public authorities and private parties to a certain degree, so that the court does not have to re-examine all the facts and evidences of the infringement.<sup>667</sup> It may also safeguard the coherent application of the competition law among multiple authorities and courts. In parallel, the consistent enforcement benefits the legal certainty of the competition law

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<sup>662</sup> Regulation 1/2003, Article 16

<sup>663</sup> Article 9 of the Directive

<sup>664</sup> Article 9 of the Directive

<sup>665</sup> The Chinese Supreme Court did not provide any reason for the removal of this Article was removed. But from the comparison of the Solicit Opinion version and the final version, it can be found that the Supreme Court looked ahead to future judicial practice coming up with a solution.

<sup>666</sup> Articles 11 and 15 of the Solicit Opinion of Judicial Interpretation on AML

<sup>667</sup> White Paper, 2.3

and increases the predictability of the litigation. As regards the goal of compensation, the advantage of the probative value or the binding effect of the final decision is evident; it will remarkably lighten the burden on the claimant to prove the infringement and encourage the filing of the follow-on action.<sup>668</sup>

The opposing argument focuses on the separation of powers and the sovereignty of the Member States.<sup>669</sup> An excessive binding effect could impair the independence of the judiciary and deprive the court of the role played in the private enforcement.<sup>670</sup> Of course, the national court cannot adopt a decision running counter to that of the Commission, which is explicitly laid down in EU law. As regards the decision of national competition authorities, it could be questionable. In China, the situation is similar. The court has a relatively higher independence than the competition authorities. Especially in China, the NDRC and SAIC are inherently lack independence. The binding effect in China would sound more problematic than in EU. The present rule in the Directive can be deemed as the possible equilibrium between different arguments above. Both of the *'irrefutable'* decision and *'prima facie evidence'* retain some room for the defendant's right to defence and the independent role of the national court on the one hand, compared with an absolute binding effect rule.

A special difficulty in the EU to enforce the probative value of the final decision is that the judges in national courts would be faced with the various law and legal cultures of other Member States. A sanguine perspective is that some of the Member States have already established the relevant binding rules in their national law. For example, an extensive and bold legislation is Section 33(4) of ARC, which prescribes that the German civil court is bound by the finding of the violation of ARC and Articles 101 or 102 TFEU by the German competition authority, by the Commission, by competition authorities or national courts in other Member States. A similar rule can be found in the UK. Section 58 of the UK Competition Act 1998 provides that the decision of the UK's competition authorities (Office of Fair Trading, OFT) has a binding effect on the Competition Appeal Tribunal for encouraging the follow-on action.<sup>671</sup>

## **b. Scope of probative value**

The scope of probative value of the final effect includes the geographical and personal scope as well as the content of the final decision. As regards the geographical scope, the EU Directive distinguished the probative value of the final decision from national authorities and authorities of other Member States. On the personal scope, the White Paper indicated that *'same practice and same undertaking(s) for which the NCA or the review court found an infringement'*.<sup>672</sup> The Working Paper of the White Paper added that *'the same agreements, decisions or practices'* that breach of competition law and *'the same individuals, companies or groups of companies'* are addressees of the decision.<sup>673</sup> A more complicated question concerns the extent to which

<sup>668</sup> See Jian Wang, 'The Advantages of the Antitrust Private Enforcement and its Implementation – On the Necessary of the Private Enforcement in China and Legal Suggestions', (反垄断法私人执行的优越性及其实现——兼论中国反垄断法引入私人执行制度的必要性和立法建议, fanlongduan fa siren zhixing de youyuexing jiqi shixian – jianlun zhongguo fanlongduan fa yinru siren zhixing zhidu de biyao xing he lifa jianyi), *Science of Law*, 2007/4, 109; see Pengcheng Zheng, *supra* n 58, 102

<sup>669</sup> See Truli, Emmanuela, White Paper on Damages Actions for Breach of the EC Antitrust Rules: The binding Effect of Decision Adopted by National Competition Authorities, 5 *Eur. Competition J.*, 2009, 813

<sup>670</sup> See Truli, Emmanuela, *supra* n 669, 813; Michael Grünberger, Bindungswirkung kartellbehördlicher Entscheidungen, in: Möschel, Wernhard; Bien, Florian (Hrsg.): Kartellrechtsdurchsetzung durch private Schadensersatzklagen? - Baden-Baden: Nomos, 2010, 188-190

<sup>671</sup> UK Competition Act 1998, Section 58

<sup>672</sup> White Paper, 2.3

<sup>673</sup> COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules, {COM(2008) 165 final} {SEC (2008) 405-406}, Brussels, 2.4.2008 SEC(2008) 404, para

the final decision has an effect in private antitrust action. The literature doubted it if the probative effect of the final decision is only on one agreement, but there are many several 'identical' agreements in the distribution chain.<sup>674</sup> It involves the question as to whether only the operative part of the decision has the probative effect or the whole decision including the operative part and the reasons adopted by the competition authorities have probative value. Taking the Commission's decision as a reference, the binding effect of the Commission's decision is only limited to the operative part of the decision.<sup>675</sup> Of course, the logic behind the binding effect of the Commission's decision is the primacy of EU law.<sup>676</sup> Assuming that when the final decision from national competition authorities found an abuse of dominance, it will be questioned whether the delineation of the relevant market or identification of the dominant position has any effect on determining the related facts before the civil court. Some opined that the reasons and/or non-operative part of the final decision of the public enforcement only have a persuasive effect.<sup>677</sup> One advantage to limit the probative value only to the operative part may prevent the reason or ground in public enforcement from being abused in the civil action, which may cause the risk of legal uncertainties and incoherent application of the probative effect of the decision among different courts.

### c. Effect of commitment

An especially dubious issue is the probative effect of the commitment decision made by undertakings in the private litigation. The literature questioned whether the injured person can appeal against the commitment decision so as to obtain the probative effect of the final decision, or whether the competition authorities should consider the interest of injured persons when they adopted the commitment procedure.<sup>678</sup> If the appeal is possible, the question of whether the limitation period of private enforcement should be adjusted to the delay follows.

On the effect of the commitment, the EU Directive did not specify any position on the binding effect of the commitment decision by the Commission or NCAs. But the Commission has once answered the questions regarding the effect of the commitment decision by stating that '*Article 9 (of Regulation 1/2003) decisions are silent on whether there was or still is breach of the EU competition rules. Thus a customer or a competitor possibly seeking private enforcement in national courts still needs to prove the illegality of the former behaviour to obtain compensation for damages.*'<sup>679</sup> In China, Article 11 paragraph 3 of Solicit Opinion of Judicial Interpretation on AML expressed a similar viewpoint, namely that the commitment of the undertakings should not be used to presume the existence of monopolistic behaviour in private litigation.<sup>680</sup>

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<sup>674</sup> See Emmanuela Truli, *supra* n 669, 807

<sup>675</sup> COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules, {COM(2008) 165 final} {SEC (2008) 405-406}, Brussels, 2.4.2008 SEC(2008) 404, para 140; Advocate-General Van Gerven indicated in case *Banks* that 'the Commission has many years of experience with the result that its findings carry a degree of authority, although such authority is not binding.' C-128/92, *Banks / British Coal* [1994], ECR I-01209, para 60

<sup>676</sup> See Veljko Milutinovic, *supra* n 237, 247-248

<sup>677</sup> Boris Andrejaš, Croatia, in: Pranvera Këllezi et al (eds.), *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-competitors*, Springer-Verlag Berlin Heidelberg 2014, 76; Heribert F Köck, Margit Maria Karollus (Hrsg.), *Die Modernisierung des EG-Kartellrechts: erste Erfahrungen der VO 1/2003*, (Baden-Baden: Nomos Verlagsgesellschaft 2008), 475

<sup>678</sup> See Emmanuela Truli, *supra* n 669, 818

<sup>679</sup> Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernized framework for antitrust scrutiny of company behaviour), MEMO/04/217, Brussels, 17. September 2004

<sup>680</sup> Article 11 paragraph 3 of the Solicit Opinion of Judicial Interpretation on AML provided that '*where the the competition authorities decided to suspend the investigation relying on the commitment made by the undertaking, this commitment of the undertaking shall not be used to infer the existence of the monopolistic behavior directly.*'

In order to analyse the probative effect of the commitment, it is important to examine several relative questions concerning the nature of the commitment procedure in both the EU and China. Firstly, it should be examined whether the commitment decision identifies or implies that the alleged practices fall within the breach of competition law. A commitment decision is made by competition authorities after a preliminary assessment to identify the competition concerns and the undertaking agrees to satisfy the concerns. In the EU, Article 9 of Regulation 1/2003 governed the commitment procedure of the EU Commission and recital 22 stated that *'commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty'*.<sup>681</sup> In the Member States of the EU, the relative commitment rule is laid down in national competition law. Taking Germany as an example, the commitment procedure can be found in Section 32b of GWB, which is initiated by the German cartel authority (Bundeskartellamt). In China, the commitment that is governed by Article 45 of AML can be conducted by both NDRC and SAIC. Further examining the content of the commitment decision that is named as *'termination of investigation decision'* in China, it can be said that it usually contains the facts of the alleged infringement, the detailed content of commitment, measures to eliminate the impact (of the infringement) and the legal results of noncompliance or not complete compliance.<sup>682</sup> The commitment does not identify an infringement, which is the major distinction to the decision of prohibition. But essentially the commitment implicitly indicates that the undertakings have committed an infringement, although the specified period has passed and competition authorities decided to abandon further investigation and sanctions. When the infringement has occurred, the parties in the market may probably have suffered harm, even if only a small amount of harm. In private action, the status of commitment is awkward because it implies (or points out) that something has happened but it has not been clearly confirmed.<sup>683</sup>

Secondly, it gives rise to the question of how to treat the commitment in the following private action. Apart from the nature of the commitment, several pivotal issues should be outlined, including the protection of the undertaking that made the commitment and the right to appeal against the commitment decision. The undertaking that made the commitment may become the defendant of the antitrust private action. The commitment decision actually informs the parties in the market about the existence of the illegal agreement or practice. Therefore, it appears to be a dilemma between the commitment of the undertaking and the injured persons, which is analogous with the dilemma between the leniency applicants and injured persons. The goals of the commitment are to economize the enforcement cost and dispel the possible harm by forcing the undertaking to comply with the law. The commitment procedure aims to encourage wrongdoers to conclude their anti-competitive behaviour as soon as possible so as to avoid further harm to the society. But it is questionable whether follow-on private action would deter the wrongdoers from committing themselves to the competition authorities, if the commitment decision can be deemed to *'some degree of probative value'*, e.g. refutable or irrefutable evidence. Similar present positions of both the Commission and the Chinese Supreme Court purport that the commitment decisions have no effect on evidence in the follow-on action. Nonetheless, the commitment decisions virtually informed the underlying injured persons about the existence of the infringement and the relative evidence can be accessed by means of disclosure or other possible procedural devices.

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<sup>681</sup> Recital (22) of Regulation 1/2003

<sup>682</sup> Provisions on the Administrative Procedures for Law Enforcement against Price Fixing, Order No.8 of the National Development and Reform Commission, 2010, Article 16 paragraph 2; Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position, Order No. 42 of the State Administration for Industry and Commerce, 2009, Article 19

<sup>683</sup> The commitment has been described by Milutinovic as 'two-sided bluff', which give the claimant the weapon that 'something is going on', as well as offer the defendant that it has been 'taken care of'. See Veljko Milutinovic, *supra* n 237, 259

In the interest of injured persons, during the phase of the market test, the EU Commission may invite comments from the interested parties on the offered commitment. The summary of the case and the content of the commitment will be published and the commitment will be revised or abandoned according to the market test. Only if the commitment has been acknowledged through the market test, can the Commission release the binding commitment decision.<sup>684</sup> The market test offers the interested parties (such as injured persons) limited opportunities to declare their interest and make the relative adjustment.

Apart from that, the interested parties can file an appeal against the commitment decision before the court in both the EU and China. By way of example, one of cases is *De Beers* Commitment, in which the third party *Alrosa* as the interested third party filed an appeal before the General Court, although this appeal was not brought for the purpose of private antitrust litigation.<sup>685</sup> The injured person who appealed against the commitment decision may probably gain a better chance to the settlement with the wrongdoer, which gives rise to the problem of the limitation period. The current limitation provision in the EU Directive suggested that the limitation is suspended or interrupted where the public enforcement is initiated. If the commitment decision has been concluded and then the third party appealed, the suspension or interruption of public enforcement certainly lasts until the decision has been finalised.

#### **d. Enforcement and error**

On the one hand, as discussed above, the probative value will decrease the enforcement cost of the action, which means that the illegality of the infringement has already been established by the decision of competition authorities.<sup>686</sup> If the final decision can be used as conclusive evidence in the private litigation, the parties and the court do not need to spend time and money on showing and assessing the relevant facts or evidences on the infringement. Furthermore, a strong probative effect, or even binding effect will increase the legal certainty and the predictability of the civil action for both parties that would therefore choose a better strategies and economize the litigation costs and other costs.

One part of the important logic behind the separation of powers and independence of the judiciary is that when the administrative authorities make a mistake, it will not influence the decision-making of the court. But an absolute binding effect will transfer the error in the final decision of the competition authorities to the judgment of the court in subsequent civil litigation, which will raise the risk of errors in private enforcement. Likewise, an absolute binding effect of the final decision on the determination of the infringement virtually deprives the defendant of the right to defence in the civil action. Especially in China where the competition authorities NDRC and SAIC lack experience and independence, it can be imaged that the probative effect will largely increase the risk of error cost. The comment on the Proposal to the directive made by the Committee on Economic and Monetary Affairs in the European Parliament submitted that *'the binding effect shall not apply in cases where obvious errors occurred during the investigation of facts or where the rights of the defendant were not duly respected during the procedure before the national competition authority or competition court'*.<sup>687</sup>

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<sup>684</sup> Antitrust: commitment decisions – frequently asked questions, European Commission MEMO/13/189, Brussels, 8 March 2013

<sup>685</sup> Case T-170/06, *Alrosa v Commission* [2007], II-02601; Case C-441/07 P, *Commission v Alrosa* [2010], I-05949.

<sup>686</sup> See Michael Harker and Morten Hvijsupra, 'Competition Law Enforcement and Incentives for Revelation of Private Information', *World Competition* 31(2), 2008, 282-283

<sup>687</sup> Draft Report of 3.10.2013, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-516.968+01+DOC+PDF+V0//EN&language=EN>, p. 37 (1.08.2014)

### **3. Leniency and private action**

#### **a. Conflict between leniency program and private action**

One of the largest obstacles for the injured persons to pursue their right to compensation is the information asymmetry between them and the infringers. The injured persons invariably lack crucial evidence on substantiating the infringement, causal link and quantification. Of course, the infringers as defendants may also have insufficient evidence and data to rebut the allegation of the claimants, such as information about the passing-on overcharge from direct purchasers. Hence, the EU Directive provides a basic framework and principles for a minimum level of disclosure of evidence among Member States so as to ensure access to evidence. One controversy as regards the disclosure is the conflict between leniency policy and the access to document in the hands of the competition authorities, especially the document referred to the immunity or reduction recipients. The access to document is likely to suppress the leniency applicants from uncovering the cartel. On the one hand, the disclosure of document relating to the leniency program is likely to lead to massive damages action, because it is possible that the applicants become the major or even only target in the litigation and it is hard for them to rebut the evidence submitted by themselves; on the other hand, the improper disclosure could result in the probability of the abuse of information including the commercial secret, namely the requests on accessing is not for litigation, but to procure the commercial secret from competitors. In sum, the introduction of the disclosure procedure might possibly conflict with the effectiveness of the leniency policy, which mirrors the underlying contradictory problem between the public and private enforcement. A range of problems are: the extent to which the evidence from the competition authorities can be accessed; whether the interested parties can apply for access to evidence from competition authorities directly; and whether the liabilities of the leniency recipients can be lightened.

#### **b. Leniency and contributions of leniency**

The leniency program stems from the US antitrust law, which aims to incentivise cartel members to confess their violations proactively and provide the competition authorities with crucial information so as to reveal the cartel. It is evidently that the leniency program increases the detection rate on cartels, which can benefit the injured persons when bringing the follow-on action for damages. In order to destabilize the cartel, the policymaker should create a prisoner dilemma and ensure the confession as the dominant strategy for all cartelists. To be specific, a sliding scale of the fine reduction is important so as to create the dominant strategy, which can encourage a fast confession and offers a better result to the first reporter than the second one. Moreover, transparency and certainty play crucial roles in the leniency program and the would-be whistle-blowers can predict the legal result of the application for the leniency.

Firstly, a sliding scale of the fine reduction exists in the public enforcement of both the EU's and Chinese competition law. The Union's competition law introduced the leniency program in 1996 and revised it in 2002 and 2006 respectively.<sup>688</sup> A sliding scale of the fine reduction has been laid down in the existing Commission's Notice (2006).<sup>689</sup> Accordingly, only the first

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<sup>688</sup> The historical content on the EU leniency program can be found in [http://ec.europa.eu/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html)

<sup>689</sup> Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O J C 298, 8.12.2006, para (8), (24) and (26); accordingly, only the first reporter can be awarded with the full immunity from fine, provided that they provide the information and evidence to enable the DG Comp to 'carry out a targeted inspection' or 'find

reporter can be awarded with the full immunity from the fine, as long as they provide the information and evidence to enable the DG Comp to ‘carry out a targeted inspection’ or ‘find an infringement’ relating to the cartel.<sup>690</sup> If they cannot obtain the immunity, they still have the opportunity to enjoy a fine reduction. The applicants can obtain a fine reduction where they submitted the related evidence with ‘significant added value’.<sup>691</sup> The first reporter can acquire a 30 to 50% reduction, the second 20 to 30%, and subsequent reporters up to 20%.<sup>692</sup>

Similar to the US and EU, China also established its own leniency rule in Article 46 (2) of AML to encourage the revelation of monopoly agreements by providing that

*‘if the undertaking, on its own initiative, reports to the authority for enforcement of the Anti-monopoly Law about the monopoly agreement reached, and provides important evidence, the said authority may, at its discretion, mitigate, or exempt the undertaking from punishment.’*<sup>693</sup>

As discussed above, non-merger public authorities are NDRC (*which take charge of monopoly agreements and abuse of dominance relating to price violations*) and SAIC (*which has competence in non-price related monopoly agreement and abuse of dominant position*). NDRC and SAIC issued their leniency rules in the form of regulations respectively.<sup>694</sup> NDRC established the leniency rules in Article 14 of *Provisions on the Administrative Procedures for Law Enforcement against Price Fixing*. Accordingly, the first reporter to submitted ‘important evidence’<sup>695</sup> related to the price monopoly agreement may benefit from the immunity of fine. The second may acquire not less than a 50% reduction of the fine. Other subsequent applicants may obtain no more than 50% reduction. NDRC has a broad discretion as regards the immunity awarded and fine reduction. There is no limitation on the number of the undertakings obtaining the immunity and reduction. It is possible that all the cartelists can obtain a reduction of fines. For example, in case auto parts price fixing cartel (2014), all the violators obtained the immunity or reduction of fine. Among them, two undertakings obtained the immunity, two more a 60% reduction of the fine, four a 40% reduction and four a 20% reduction. In the case *Zhejiang Insurance price fixing cartel*, only one undertaking obtained the immunity, one the 90% reduction of fine and one the 45% reduction among 23 insurance companies. The Provisions do not explicitly preclude the cartel organizers or ringleaders of the agreement from applying for the leniency.

The leniency rules adopted by SAIC on the non-price related monopoly agreement can be found in Article 20 of *Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position (2011)* and Articles 11-13 of *Provisions for the Industry and Commerce Administrations on the Prohibition of Monopolistic Agreements (2009)*.<sup>696</sup> The

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an infringement’ relating to the cartel. If they cannot obtain the immunity, they still have the opportunities to enjoy a fine reduction. The applicants can obtain a fine reduction where they submitted the related evidence with ‘significant added value’.

<sup>690</sup> See Supra, O J C 298, 8.12.2006, para (8)

<sup>691</sup> See Supra, O J C 298, 8.12.2006, para (24)

<sup>692</sup> See Supra, O J C 298, 8.12.2006, para (26)

<sup>693</sup> Article 46 (2) of AML

<sup>694</sup> See *Provisions on the Administrative Procedures for Law Enforcement against Price Fixing*, Order No.8 of the National Development and Reform Commission, 2010; see *Provisions for the Industry and Commerce Administrations on the Prohibition of Monopolistic Agreements*, Order No. 53 of the State Administration for Industry and Commerce, 2009

<sup>695</sup> The ‘important evidence’ is the evidence ‘plays a key role’ in the NDRC’s determination of the price monopoly agreement.

<sup>696</sup> Article 20 of *Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position* provides that ‘the Administrative Departments for Industry and Commerce may award reduction and immunity on its discretion to undertakings which reported the information and submitted important evidence in connection with (non-price related) monopoly agreement proactively.’ The ‘important evidence’ here implies the evidence that is either ‘sufficient to initiate an investigation’ or ‘plays a key role’ in determining the violation. Article 11 provides that

discretion of the SAIC regarding leniency is even broader than that of NDRC. Article 12 of the Provisions on the Prohibition of Monopolistic Agreements did not provide an explicit sliding scale for fine reduction by stating that, apart from the first reporters submitting important evidence and obtaining the immunity, the subsequent reporters have the opportunity to obtain the reduction that is determined by SAIC discretionally. Moreover, the organizer of the agreement is not allowed to apply the leniency rule under this Article.

Secondly, both the 2002's and 2006's reforms of the EU Leniency Notice intended to improve transparency and the certainty of the application of leniency on fines.<sup>697</sup> Transparency and certainty imply that the immunity or reduction can be predicted to some extent by the would-be applicants. Rational and independent cartelists would carry out the cost-benefit analysis before committing the confession. The various issues that the cartelists would assessed include the cost of breaking the trust within cartel, the cost paid for the investigation, the influence of the confession when it is an international cartel, their own reputation and the securities law, the profit and cost of continuing the cartel, the detection rate, etc.<sup>698</sup> More importantly, the possible damages and fines under applying the leniency and continuing the cartel are imperative issues that determine whether the cartelists will prefer a fast confession. Under such consideration, the certainty and transparency of the leniency program is considerably significant for the decision-making of cartelists, especially for the circumstance of the co-existence of public and private enforcement.

As regards the contribution of the leniency, it has been proven that the leniency program is effective in revealing the cartel in both the EU and China. The two reforms from 2002 and 2006 improved the effectiveness of the program in the EU. According to the empirical data, there were 16 applications from 1996 to 2002.<sup>699</sup> The case number rose to 167 during the period of 2002 to 2005 and 80 from 2006 to 2008.<sup>700</sup> As regards the result of the leniency on the revelation of the cartel, the €4, 5 billion fines have been imposed based on 34 applications from 1996 to 2007.<sup>701</sup> Another empirical analysis of the data of the leniency applications from 2000 to 2011 in the EU shows that the numbers of leniency cases increased evidently.<sup>702</sup>

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'undertakings who proactively report the related information of the monopoly agreement to the administrative departments for industry and commerce can be granted with a reduction or an immunity of fine. The reduction or immunity decision by the administrative departments for industry and commerce shall be determined according to the time sequence of voluntary self-reports by the undertakings, importance of the evidence provided, relevant information about concluding or implementing the monopoly agreement, and its cooperation with the investigation at its discretion. Important evidence refers to evidence that is sufficient to initiate an investigation or that plays a pivotal role in finding a monopoly agreement by the administrative departments for industry and commerce, including information on the parties to the agreement, products involved, the form and content of the agreement and specific details of implementation of the agreement.' Article 12 provides that 'the first undertaking who proactively reports to the administrative departments for industry and commerce about the related information of monopoly agreement, provides important evidence and cooperates with the investigation comprehensively and proactively shall be granted with immunity of fine. Other undertakings that proactively report about the related information of monopoly agreement and provides important evidence shall be granted with reduction of fine at its discretion'.

<sup>697</sup> See Andreas Stephan, An Empirical Assessment of the European Leniency Notice, 5 *J. Comp. L. & Econ.* 537-561 2009, 553; Sharon Oded, Leniency and Compliance: Towards an Effective Leniency Policy in the Chinese Anti-Monopoly Law, in: Faure, Michael / Zhang, Xinzhu (Eds.), *The Chinese Anti-Monopoly Law: New Developments and Empirical Evidence* (New Horizons in Competition Law and Economics Series), 2013, 151-154

<sup>698</sup> See Christopher R. Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability, *Journal of Corporation Law* 31 2006, 453-488

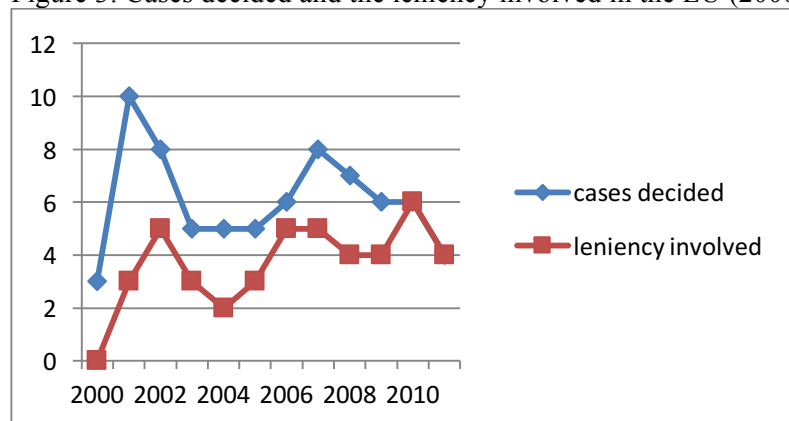
<sup>699</sup> François Arbault, Francisco Peiro, Competition Policy Newsletter, Number 2, June 2002, 15

<sup>700</sup> European Commission (2006), Competition: Commission Proposes Changes to the Leniency Notice – Frequently Asked Questions, MEMO/06/357; European Parliament (2009), Parliamentary Questions: Joint Answer Given by Ms Kroes on Behalf of the Commission to Written Questions E-0890/09, E-0891/09, E-0892/09, 2 April 2009

<sup>701</sup> See Andreas Stephan, *supra* n 697, 542-543

<sup>702</sup> See Kai Hüschelrath, Public Enforcement of Anti-cartel Laws – Theory and Empirical Evidence, in: Hüschelrath and Schweitzer (eds.), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, (Springer-Verlag Berlin Heidelberg 2014), 27-28

Figure 3: Cases decided and the leniency involved in the EU (2000-2011)<sup>703</sup>



It should be noted that the monopoly agreement consists not only of the horizontal agreement (under Article 13 of AML), but also the vertical agreement (under Article 14), which is different from the alleged cartel prescribed by the Commission's Notice in the EU.<sup>704</sup> Usually, the vertical agreement is not as extensively concealed and complicated as the cartel. Most of the cases applying for leniency are cartels since 2010, such as the case *Guangxi rice noodle price cartel* in 2010 (12 of the total cartel members obtained immunity), *Guangdong sea sand price cartel* in 2012 (one of the cartel members acquired 50% reduction on fine).<sup>705</sup> However, in 2013 three undertakings in connection with RPM of the infant milk formula powder also received full immunity of the fines, which gave rise to substantial controversies on whether the leniency can also be applied to the vertical agreement.<sup>706</sup>

Thus far, there is no record of any application of leniency by SAIC during 2010 to 2015. NDRC has awarded immunity and fine reduction in at least 4 cases among a total of 6 in the same period, including the case *Hitachi Automotive Systems Ltd. and other entities* (2014) and the case of the *Zhejiang Insurance price fixing cartel* (2013).<sup>707</sup> Both of the cases are horizontal agreements. In the case *Hitachi Automotive Systems Ltd. and other entities*, two undertakings (Hitachi Automotive Service and Nachi) as the first reporter obtained the immunity.<sup>708</sup> In the final decision, NDRC mentioned that these two immunity recipients '*reported the relevant information of the monopoly agreement proactively and ceased the infringement*'.<sup>709</sup> Apart from these, two other undertakings (NSK Ltd. and Denso Corporation) were awarded a 60% reduction of fine. Four undertakings (NTN Corporation, Sumitomo Electric, Furukawa Electric and Yazaki) received a 40% reduction of fine.<sup>710</sup> Another four undertakings (JTEKT, Asian Industry, Mitsubishi Electric and Mitsuba) obtained a 20% reduction of fines.<sup>711</sup> In this case, all the 12 undertakings were awarded with different levels of reduction of fines. The other case

<sup>703</sup> The data can be found in Hüschelrath's studies, see Kai Hüschelrath, *supra* n 702, 27-28

<sup>704</sup> Article 13(2) of AML provides the definition of the monopoly agreement that 'monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition.'

<sup>705</sup> The brief decision on these case is available at NDRC's Website [http://www.ndrc.gov.cn/fzgggz/jgdyfld/fjgld/201402/t20140228\\_588558.html](http://www.ndrc.gov.cn/fzgggz/jgdyfld/fjgld/201402/t20140228_588558.html);

[http://jjs.ndrc.gov.cn/fjgld/201003/t20100331\\_338237.html](http://jjs.ndrc.gov.cn/fjgld/201003/t20100331_338237.html);

[http://www.ndrc.gov.cn/fzgggz/jgdyfld/jjszhd/201210/t20121026\\_510835.html](http://www.ndrc.gov.cn/fzgggz/jgdyfld/jjszhd/201210/t20121026_510835.html);

<sup>706</sup> The decision by NDRC can be found at [http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807\\_552991.html](http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html).

<sup>707</sup> See *Hitachi Automotive Systems Ltd. and other entities* [2011], Chinese National Development and Reform Commission, NDRC [2014] No.2-13 (发改办价监处罚 [2014], 2 号-13 号), 15 August 2014; *Zhejiang Province Insurance Industry Association and others*[2013], Chinese National Development and Reform Commission, NDRC [2013] No.4 (发改办价监免 [2013], NDRC [2013] No. 7-29), 30 December 2013, available at <http://jjs.ndrc.gov.cn/fjgld/> or at <http://www.kluwercompetitionlaw.com/CommonUI/chinese-case-summaries.aspx>

<sup>708</sup> See *Hitachi Automotive systems*

<sup>709</sup> See *Hitachi Automotive systems*

<sup>710</sup> See *Hitachi Automotive systems*

<sup>711</sup> See *Hitachi Automotive systems*

*Zhejiang Insurance price fixing cartel* awarded 1 undertaking (PICCP & C Zhejiang Branch) with immunity, 1 undertaking (China Life Zhejiang Branch) a 90% reduction of fine and 1 undertaking (Ping An Insurance Zhejiang Branch) a 45% reduction of fine among 23 undertakings and 1 association in Insurance Industry of Zhejiang Province.<sup>712</sup> In the decision of the immunity, NDRC addressed that PICCP & C Zhejiang Branch offered the decisive evidence in relation to the conferences of the premium and other charges among undertakings, the information about the discussions of the premium and other charges and the fixed price measures.<sup>713</sup>

Table 4: Cases decided and leniency involved (2010-2015)

Competition authorities	Number of cases	Cases awarded leniency
NDRC	6	4
SAIC	21	0

### c. Trade-off between absolute protection and case-by-case examination

It can be found that the Commission and Court of Justice held different positions on dealing with the disclosure requests, which mirrors the conflict between public and private enforcement. In four predominant cases, the Court of Justice, regardless of the request upon the document of national competition authorities in *Pfleiderer* and *Donau Chemie* or of the Commission in *CDC* and *EnBW*, insisted on a case-by-case examination exercised by national courts of the disclosure requests. The Court of Justice disagreed with the dogmatic forbiddance regarding documents of the leniency by stating that the case-by-case weighing exercise is reasonable when ‘*taking account of the fact that access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation*’.<sup>714</sup> Meanwhile, the Commission underlined the significance of these crucial documents for the effective leniency program and additionally for the public enforcement in its observations and inclined to grant an absolute protection of the leniency program. In the Leniency Notice, it stated that ‘*the voluntary presentations ... should not be discouraged by discovery orders issued in civil litigation*’. Under absolute protection of the leniency, the Commission suggested in the White Paper that ‘*a minimum level of disclosure*’ should be exercised upon ‘*fact-pleading and strict judicial control*’ and ensure ‘*sufficiently precise categories of evidence to be disclosed*’.<sup>715</sup> The present directive adopted the categorical disclosure of the document, thereby prohibiting the leniency statement from being discovered completely.

### d. Reasonability of the absolute ban on the leniency statement?

A more controversial problem for private parties is the absolute ban on the leniency statement, compared with the temporary prohibition on the disclosure. The absolute ban implies that the claimant will never obtain the opportunity to access to the leniency statement, regardless of whether from the competition authorities or from the parties in the leniency program. Some literatures opined that the absolute ban of the leniency statement is not the optimal solution for this conflict between private and public enforcement. For example, *Buccirossi*, *Marvão* and *Spagnolo* indicated that the ban of the leniency statement and the immunity of the joint and several liability have different impacts on the private follow-on action.<sup>716</sup> They suggested the

<sup>712</sup> See Zhejiang Insurance Industry

<sup>713</sup> See Zhejiang Insurance Industry

<sup>714</sup> Case C-536/11, *Donau Chemie and Others* [2013], para 39; see Nicholas Hirst, supra n 283, 485

<sup>715</sup> White Paper, 2.2

<sup>716</sup> See Paolo Buccirossi, Catarina Marvão, and Giancarlo Spagnolo, *Leniency and Damages*, No.32 Stockholm

model that grants complete access to all the documents including the leniency statement and removes the joint and several liability of the immunity recipients. A different opinion was discussed by *MacCulloch* and *Wardhaugh* who held that public enforcement is more effective than private action on the deterrence, which should be protected first.

As discussed above, the sentiments that support preclusion of the leniency statement from being discovered consist of the fear that the would-be whistle-blower would be deterred from committing into the antitrust action because of subsequent follow-on action and of the protection commercial secret. Yet effectively, when the joint and several liability has been removed by the directive and when the commercial secret can be protected under the control of the civil court, allowing the claimant access to documents could be not so terrifying. In this part, the significance on why the joint and several liability of the immunity recipient should be removed will be discussed first. Then reasonability of the absolute ban on the leniency statement from the third perspectives: the demand of the claimant for the data included in the leniency statement; the fear of adverse position and commercial secret; and legal certainty under the discretion of the court. Actually, absolutely precluding the leniency statement from being discovered could be inconsistent with the goal of full compensation laid down in the directive. An exception of the absolute ban under the rigid supervision and control by the court could probably be a desirable option.

#### **aa) Joint and several liability**

Before examining the present rules regarding the disclosure, it is necessary to discuss the elimination of the joint and several liability of the immunity recipient because there is an inherent link between these two themes under the consideration of the deterrence. When the would-be whistle-blowers decide to submit a leniency application, they will definitely assess the benefit they can obtain and the cost they need to pay for it from both the leniency and continuing cartel. In addition, there is the argument that was addressed by the Commission stating that the whistle-blower would become the major target in the private action and it would be hard for them to rebut the evidence of self-incrimination. The follow-on damages action could deter the cartelists from participating in the leniency considering the damages action. Therefore, the civil liability for recovery in the follow-on civil action is undoubtedly a major factor that will be taken into account.

The current EU Directive restricted liability of the immunity recipients only regarding their own purchasers and on the share they are responsible for. The only exception is based on the insolvency of other cartelists as regards the full compensation of the injured persons. Apart from the current model in the Directive, there are also the American model and Hungarian model that are noticeable as references. The American model grants the immunity recipients with the de-treble damages (single damage, in other words) to their own purchasers.<sup>717</sup> As to the so-called '*Hungarian model*', the immunity recipients do not burden any recovery liabilities if the injured persons can obtain the damages from any co-cartelists.<sup>718</sup> It does not preclude the likelihood that the injured persons bring a joint action against all the infringers. Under such circumstances, the claims against immunity recipients should be stayed until the infringement decision of the competition authorities become final.<sup>719</sup> Moreover, *Kirst* and *Van den Bergh* suggested a proportionate reduction of damages according to their contribution on the leniency

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Institute of Transition Economics, Stockholm School of Economics, 2015

<sup>717</sup> Section 213 of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)

<sup>718</sup> Article 88D of the Hungarian Competition Act

<sup>719</sup> Article 88D of the Hungarian Competition Act

and the cartelist failed to obtain the immunity or reduction should burden the full compensation.<sup>720</sup>

It should be noted that the '*Hungarian model*' could challenge the traditional tort law on the conceptions of '*responsibility*', '*civil liability*' and '*full compensation*'. The cartelist with large market share is very likely to be the one that has a larger responsibility for the cartel than other middle or small cartelists and that also has more market power to bargain in the market. Under such consideration, the reduction of the amount of damages can hardly be justified. It is questionable whether exempting the civil liability of the cartelist is not due to its legal responsibility in the cartel, but rather to the revelation of the cartel and the cooperation with the competition authorities. Meanwhile, the independence of private action implies that the immunity recipient should not be exempt from the civil liability and this was also addressed by the Commission in case *National Grid*.<sup>721</sup> The contribution of the successful leniency program on enforcement does not imply that the interests represented by the successful leniency program overrides the individual right to pursue damages in the follow-on civil action.

As regards the effective leniency, under the model of the EU directive, when the immunity recipient is an undertaking with a large market share and corresponding responsibility for its own customers, there is a possibility that the damages it burdened exceed the benefit it obtained from the immunity of fine and hence the large amount of damages will deter this cartelist from applying leniency.<sup>722</sup> But the answer to this problem is the detection rate of the public enforcement, not exemption of the damages. A successful prisoner dilemma is based on the precondition that the competition authorities can prove a minor crime which places the confession as the dominant strategy. If the competition authorities cannot prove this minor crime which implies the continuation of the cartel is profitable, the cartelists could be worse off when they confess compared to when they deny. In particular, when the cartelists trusted each other and believed that no one would commit to the confession, continuing the cartel is a better strategy. In fact, the competition authorities have various detection instruments, including the leniency, complaints and economic analysis, etc. Although the leniency is the most dominant and attractive, other instruments could probably break up the trust among cartelists. Regardless of the number of the undertakings that can obtain the immunity, a fast confession under a large detection rate is more desirable for the cartelists than denial according to the present model in the EU Directive. Therefore, determining confession or denial of cartelist does not equate to the amount of damages, but the possibility of detection by the competition authorities.

As regards full compensation in private action, some doubted whether the current provisions envisaged by the EU legislator would bring more complications and uncertainties for both injured persons and immunity recipients. For injured persons, it is questioned whether the injured person can still file a joint action against all the cartelists. If they cannot, there is a risk that they may need to afford higher litigation costs due to the more than once actions. Moreover, for the would-be whistle-blowers, they would predict whether the other cartelists have the ability to recover the full compensation of the injured persons.<sup>723</sup> It is particularly difficult when the distribution chain is long and complicated.

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<sup>720</sup> See Philipp Kirst, Roger Van den Bergh, The European Directive on Damages Actions: A Missed Opportunities to Reconcile Compensation of Victims and Leniency Incentive, *Journal of Competition Law & Economics*, 2015, 1-30

<sup>721</sup> Article 11(4) of the Directive

<sup>722</sup> See Philipp Kirst, Roger Van den Bergh, *supra* n 720, 19; Kirst and Van den Bergh addressed the question that whether the cartelist with large market share would be deterred by the current provision of Joint liability in the directive, because of the underlying the large amount of damages claimed by its own customers. Hence, they suggested a proportionate reduction in the amount of damages with the reduction of fine from leniency.

<sup>723</sup> See Peter Gussone and Tilmann M. Schreiber, „Private Kartellrechtsdurchsetzung: Rückenwind aus Europa? Zum Richtlinienentwurf der Kommission für kartellrechtliche Schadensersatzklagen“, *WuW* 11/2013, 1055; see Carsten Krüger, „Der Gesamtschuldnerausgleich im System der privaten Kartellrechtsdurchsetzung“, *WuW* 01/2012, 12; see Raphael Koch, „Rechtsdurchsetzung im Kartellrecht: Public vs. private enforcement: Auf dem Weg zu einem level playing field?“, *JZ* 8/2013, 394

It has been suggested that the judgment-sharing agreement is one of the possible solutions to this certainty.<sup>724</sup> The judgment-sharing agreement is reached by co-cartelists so as to determine their responsibilities respectively for antitrust damages in the litigation against any of them. It aims to overcome the high risk of joint and several liability undertaken by any of the cartelists considering treble damages.<sup>725</sup> Liabilities usually depend on the market share and are sometimes determined by settlement or at trial. It can eliminate the uncertainty of civil liability of the private antitrust action.

## **bb) Disclosure of the leniency statement**

Three perspectives can be discussed to show that the case-by-case examination of the disclosure request of the corporate statement is much more appropriate than the absolute prohibition including the demand of the claimant regarding the crucial evidence, whether the case-by-case examination would place the immunity recipient in a less favorable position, and the fear regarding legal uncertainty.

### **(1) Demand of claimant on data**

In the follow-on action, the claimant generally needs to prove the causation and amount of damages. As regards the cartel case, Article 17(2) of the directive which prescribes a rebuttable presumption on the damages caused by the cartel largely alleviates difficulties in proving the causation and damages for claimant (especially for the direct purchasers). But it should be noted that even with such a presumption the detailed data is still in demand in antitrust action. When the defendant can show the possibilities that the causal link does not exist, the claimant still needs to produce the proof on the causal link. Furthermore, on the quantification of harm, both the claimant and the court demand detailed data and facts to carry out the calculation, especially the econometrics and regression analysis. In cartel cases, the econometric analysis is usually used to assess the relationship between the agreement and the price, which sets a relatively high standard for the data. The accurate level of the econometric analysis depends on whether the presented data is sufficient and reliable and whether the function or model is appropriate for the data. Therefore, the antitrust action which requests the precise economic assessment put a great demand on the information and data, some of which are in the hands of the leniency program and can be discovered in civil action.

As regards the significance of the information in the leniency statement, it is imperative for the injured persons to be able to have the opportunity to access the leniency statement. The Directive defined the 'leniency statement' as '*an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information*'.<sup>726</sup> In order to obtain the immunity, the applicants need to submit the information on the functioning of the cartel and

<sup>724</sup> See Carsten Krüger, *supra* n 723, 12

<sup>725</sup> See Christopher R. Leslie, 'Judgment-Sharing Agreement', *Duke Law Journal* February 2009, Vol. 58 No. 5, 752

<sup>726</sup> Article 2(16) of the Directive; the Leniency Notice provided the components of the corporate statement that contains (a) the details of cartel arrangement; (b) the names and addresses of all cartelists; (c) the names, positions, office locations and home addresses of all individuals involved; (d) information on which other competition authorities

their role in the cartel including: (a) the details of cartel arrangement; (b) the names and addresses of all cartelists; (c) the names, positions, office locations and home addresses of all individuals involved; (d) information on which other competition authorities have been approached or they intend to approach; (e) other evidence.<sup>727</sup> The details of the cartel arrangement include the aims, activities and functioning of the arrangement; the product or service; the geographic scope; the duration of and the estimated market volumes; dates, locations content of and participants of the cartel; and all relevant explanations.<sup>728</sup> The same content as in the statement submitted by the applicants so as to obtain the reduction, provides ‘significant added value’ to strengthen the ability of the Commission to prove the cartel.<sup>729</sup> Of course, some of the basic information above can be found in the non-confidential document, for instance, the final decision that the Commission released on its website. But other information such as the role of the defendant in the cartel, detailed data related to the market volumes which may be imperative for the establishment and quantification of the damages would be hard to find in a non-confidential document. The corporate statement is only prepared only for the leniency application, which could not be obtained from the dawn-raid or other investigation measures. Meanwhile, the information of the corporate statement on the functioning of the cartel and the role of the cartelists has considerable evidential value for detecting and determining the cartel (also for the private action), which is different from the pre-existing documents.

The absolute prohibition of the leniency statement that was laid down in the present directive has its disadvantages as regards the information asymmetry. Firstly, the major objective of the private enforcement needs to fully compensate the loss sustained by the injured persons and a dogmatic absolute block of on the leniency statement is likely to prevent the claimants from accessing to the key evidence so as to be succeed in action, which is inconsistent with full compensation. In addition, the possibilities of the disclosure of the corporate statement may incentivise the cartelists to reach an early settlement with the injured persons. In different cases, claimants may have different demands on evidence for pursuing the right to compensation, which virtually requests a case-by-case assessment that upheld in the cases *Pfleiderer* and *Donau Chemie* by the Court of Justice. In parallel, the court could assess whether the claim or request of disclosure is meritorious and is not abused by the claimant.

## **(2) Fear of commercial secret and unfavourable position**

Two different fears as to discovering the leniency statement that would deter the would-be whistleblowers from participating into the leniency program are: the fear of revealing the commercial secret and the fear of the unfavourable position of the immunity recipient in the follow-on civil action.

Considering the unfavourable position mentioned by the Commission in its observation of the case *National Grid*, without considering the possibility of the insolvent co-cartelists, the removal of joint and several liabilities can considerably alleviate the risk of the unfavourable position of the immunity recipient, because the immunity recipient is only responsible for his own liability. Under the restriction of joint liability, allowing the claimant an opportunity to obtain access to the corporate statement will not generate any additional risk on the amount of damages that the immunity recipient is responsible for and hence on the less favourable position of the immunity recipient in the litigation. Of course, when taking the co-cartelists’ inability to pay into account, the immunity recipient should burden the liability of full compensation for all the victims. This adverse situation will only occur where all the co-cartelists are insolvent as to full recovery. In the EU, only the first report that satisfies the conditions laid down in the

<sup>727</sup> Leniency Notice, para (9)

<sup>728</sup> Leniency Notice, para (9) (a) subsection 1

<sup>729</sup> Leniency Notice, para (24), (25)

leniency notice can obtain immunity. All the other cartelists should bear the full compensation. Generally speaking, the major cartelists are big companies in one industry that have the market power and financial resource to fix the price and quantity. Therefore, the risk of the immunity recipient bearing the full compensation is relatively low. Moreover, the amount of the fine could be adjusted so as to solve the problem of the cartelists' inability to pay and ensure full compensation, which will be discussed in the next part.

Moreover, other doubts as to whether the present provision would deter the subsequent reporters (who obtained reduction of fine) from participating in the leniency procedure and the disclosure of the corporate statement would place these reporters in an unfavourable position in the litigation. In fact, it may also incentivise the competition among the would-be whistleblowers to apply immunity and in cooperating with competition authorities before the final immunity has been confirmed, because there are considerable differences between the legal consequences of the immunity recipients and other cartelists in both public and private enforcement. In order to obtain immunity, the whistleblowers will act more proactively in preparing and submitting the evidence, which is desirable for public enforcement. Of course, when there is already an applicant for the immunity, the Commission would not consider another applicant before it makes a decision on the former applicants according to the Leniency Notice. Under such circumstances, the subsequent reporters would be deterred from leniency. But it is still better off in encouraging the cartelists to participate into the leniency before the Commission decides on the immunity recipient.

As regards the protection of commercial secrets, the corporate statement undoubtedly contains a large amount of commercial secrets that need to be protected in the private action. The Commission provides a rigorous protection on the identity of the applicants and on the information involved in the leniency notice. Firstly, the identity of the applicants will not be discovered until the final decision has been released. The addressees of the statement of objections can only access the corporate statement in order to safeguard their right to defence and under the strict restriction, including no copy of the information and the usage of the information only for the purpose of judicial or administrative proceedings (otherwise it would incur punishment).<sup>730</sup> Secondly, as regards the cooperation with other national authorities, the corporate statement will only be transferred under the exchange of information rule in Regulation 1/2003 (Article 12).

In light of the current directive, the Commission is prohibited from transferring the corporate statement to national courts, which is based on the ground that the effectiveness of the public enforcement and the function of the leniency would otherwise be impaired.<sup>731</sup> It implies that not only the transmission of the information between the Commission and the national court, but also the observation submitted by the Commission to the national court should not contain the confidential information in the corporate statement. It is questionable whether the absolute prohibition of the leniency statement from discovering would undermine the effective functioning of the Commission as *amicus curiae* under Article 15 of the Regulation 1/2003.

Another questionable issue is whether the case-by-case examination on the disclosure request launched by the national court definitely leads to incompetently protection of the commercial secret. In the litigation, it is possible that both the claimant and the defendant (other cartelists) may demand access to documents from the competition authorities. These parties can be ordered not to abuse or disclose the commercial secret in the corporate statement under certain measures and supervision by the courts. The measures of the protection of the corporate

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<sup>730</sup> Leniency Notice, para (33); other parties in the process have no right to access to the corporate statement and such protection of the corporate statement will be invalid when the applicants proactively discovered the information in statement to other persons.

<sup>731</sup> COMMUNICATION FROM THE COMMISSION Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC, (2015/C 256/04), para 3

statement that are laid down in the leniency notice, including no copy of the information and the usage of the information only for the purpose of judicial or administrative proceedings, are likewise useful in the protection of the confidential information of the statement in the private action. As a comparison, the Judicial Interpretation on AML also provides the measures for the protection of the commercial secret in the antitrust action, consisting of ‘conducting the trial in camera, restricting or prohibiting photocopying, limiting disclosure of documents solely to attorneys, ordering parties to sign a confidentiality document, etc., upon the application of the parties or at the court’s own discretion.’<sup>732</sup>

In sum, the doubts as to the disclosure of the leniency statement that would place the immunity recipient in a less favorable place are questionable. On the one hand, under the present EU directive purporting that the joint and several liabilities of the recipient have been removed, the risk for the immunity recipient resulting from the disclosure of the statement may not be low. On the other hand, there are procedural instruments in antitrust action that can protect the confidential information in the corporate statement.

### (3) Protection of legal certainty

As discussed above, the transparency and certainty of the leniency program is important for its effectiveness, because would-be whistle-blowers are able to predict the result of the leniency application explicitly which may facilitate their decision-making. The Commission disagreed with the case-by-case examination held by the Court of Justice, addressing the sentiments that the certainty of leniency would be impaired and the absolute ban on the corporate statement can ease the uncertainty which existed in case-by-case.<sup>733</sup>

But the source of the fear regarding uncertainty is questionable. This uncertainty can be predicted to a certain degree. Firstly, as regards the responsibilities leniency immunity should bear out without considering the insolvent cartellists, the prediction is effectively the cost-benefit analysis carried out by the would-be whistleblower before they made the decision as to whether to confess to the competition authorities. As discussed above, such a cost-benefit analysis could be complicated in the real world and involves the different variables.<sup>734</sup> Although complicated, it is not impossible to exercise a relatively precise prediction on the possibilities of disclosure and on the damages that they would probably afforded. Denying the case-by-case examination on the disclosure request and hence creating considerable obstacle for the victims is not consistent with the corrective justice.

Secondly, another uncertainty concerns forum shopping in the EU. The attitudes of the national court among different Member States concerning the examination of the disclosure request may largely lead to forum shopping and conflicting results within the same case. Undoubtedly, under the case-by-case examination, claimants before the national courts in the Member States such as the UK may find it easier to obtain the opportunity to access documents in the possession of the competition authorities than that in other States, for example Germany. The States with stricter examination of the disclosure requests may be more attractive for leniency applicants. It is true that the absolute prohibition of the disclosure of the corporate statement could diminish the influence of the discretion of the national courts. This forum shopping is hard to be avoided under the diversity of the civil procedural law among Member States. More detailed rules

<sup>732</sup> Article 11 of the Judicial Interpretation on AML

<sup>733</sup> See Philipp Kirst, Roger Van den Bergh, *supra* n 720, 12

<sup>734</sup> The various variables involved may include the likelihood for the whistleblower to obtain the immunity and reduction of fine, the possible amounts of fine under reduction or without the reduction, the likelihood of the follow-on damages action being brought, the amounts of damages sustained by the whistleblowers with and without the joint liability, the success rate and disclosure rate in follow-on action, the correlation between the success rate and the disclosure rate, the profit the whistleblower could obtained from continuing the cartel, as well as the detection rate without the leniency, etc.

concerning the preconditions of disclosure and the experience can probably overcome forum shopping somewhat.

#### e. The solutions for China

As introduced in the first chapter, one of the explicit shortcomings of the Chinese public enforcement (including the leniency program) is non-transparency of the investigation and decision-making as well as the undue discretion of the competition authorities (NDRC and SAIC). Article 41 of AML provides that *‘the competition authorities and its staff members have the duty to keep confidentiality of the commercial secret that was procured from the investigation’*. Of course, the reform of the Chinese leniency is not a major topic of this paper, although the source of some of the questions is non-transparent public enforcement. But it cannot be denied that the non-transparent leniency program would influence the private action, including the provisions concerning the access to evidence.

As regards access to documents in the possession of the Chinese competition authorities, it is lacking a measure that can ensure the interested parties can access documents in the possession of the competition authorities. A typical disclosure mechanism is also lacking in Chinese civil procedural law, except Subsection 2 of Article 64 of CPL, which provides the court can inspect and gather the evidence where the parties and their attorneys cannot due to the objective reasons, or the court opines the requisite evidence for the litigation. Articles 15 to 22 of the Judicial Interpretation on Evidence provide the detailed interpretation of this Article. First of all, Article 15 of the Judicial Interpretation on Evidence explains the circumstances for *‘the requisite evidence for the litigation (that the court opined)’* as two types, i.e. evidence *‘likely referring to the nation’s interest, public interest or legitimate interest of the third party’*; as well as evidence *‘referring to supplement litigants, suspend action, terminate action, referring to rule of avoidance and other pure procedural issues’*.<sup>735</sup> In addition, litigants and their attorneys can apply to the court to inspect and gather the evidence, including: (i) evidence *‘referring to documents and materials preserved by the state body and must be procured by the court pursuant its competence’*; (ii) evidence *‘referring to materials of the national secrecy, the business secrecy or the individual privacy’*; (iii) evidence that *‘cannot be gathered solely by litigants or their representatives due to objective reasons’*.<sup>736</sup> The request for the court to gather the evidence must be submitted in writing with basic information of the party that held the evidence, the content of the evidence, the reason of the request and the facts that need to be proven by the requested evidence.<sup>737</sup> The request should be filed no later than seven days before the deadline of evidence production (which is usually set by the court).<sup>738</sup>

For the follow-on action, it is necessary to further facilitate the access to documents of the competition authorities. It further refers to the reform of the civil procedure law and the transparency of the government document. As regards the antitrust action, there are suggestions addressed in literature discussing about the reasonable reform of the current Article 64 of CPL, including drawing a much explicit line on the preconditions of the inspection of evidence by the courts, (for instance, the questions such as a much more precise interpretation of *‘the objective reasons that hinder the parties to gather the evidence’*; or under which circumstance the court should reject the application of the parties, etc.) and the rules regarding *‘the confidentiality’*.<sup>739</sup> In sum, it is still difficult for interested parties to seek for the opportunity

<sup>735</sup> Article 15 of the Judicial Interpretation on Evidence

<sup>736</sup> Article 16, 17 of the Judicial Interpretation on Evidence

<sup>737</sup> Article 18 of the Judicial Interpretation on Evidence

<sup>738</sup> Subsection 1 of Article 19 of the Judicial Interpretation on Evidence

<sup>739</sup> See Hao Li, On the Contesting Parties’ Right of Application for Investigation and Collecting Evidence in Civil Litigation, (论民事诉讼当事人的申请调查取证权, *lun minshi susong dangshiren de shenqin diaocha quzheng quan*), *The Jurist* 2010 Issue (3), pp. 118-130

to access to documents in the possession of the Chinese competition authorities, regardless of directly application of the discovery from the competition authorities or by means of the civil action. The contributions of the public enforcement to the injured persons to bring the private action are very limited.

According to the discussion above and the current Article 64 of CPL, there is a need to allow the claimant of antitrust action to access to documents from the competition authorities to a certain degree so as to facilitate the follow-on action. A model with limitation of joint and several liabilities of the immunity recipient and allowing the court with the discretion on a proactive collection of the information within the corporate statement under the application of the interested parties in the litigation may probably be more appropriate than the current situation. Of course, it should be noted that the additional solution for the ineffective follow-on action in China also lies with further reform of the leniency program and the disclosure could be an option.

Briefly summing up the discussion above, the limitation of the joint and several liabilities of the immunity recipient is necessary as considering the underlying deterrent effect of the follow-on damages action. When the joint liability has been removed, insisting on absolute protection of the corporate statement could be questionable. On the one hand, the information asymmetry between the claimant and the defendant continues to exist. The claimant may have a huge demand on the crucial information that may only be inclusive in the corporate statement. On the other hand, under the limitation of the joint liability, the arguments that held an absolute protection are not that reasonable.

#### **4. The reconciliation of the fine and damages**

In the EU and China, the dual antitrust enforcement system that consists of public and private enforcement could result in three different scenarios, including the case only with the public sanction, the stand-alone action that only involved into the private action and the follow-on action (and follow-on public enforcement). It is likely that different scenarios would lead to different deterrent effects: under-deterrence or over-deterrence. Neither under-deterrence nor over-deterrence can fulfil the optimal enforcement. Hence, this paper aims to discuss the deterrence under the three scenarios and attempts to make some suggestions as to the avoidance of the under-deterrence and the over-deterrence. In the first part, the theory of optimal sanction and its correlation with deterrence will be roughly introduced, which can be deemed as a theoretical basis for the further discussion. In the second part, the deterrent effect of the first and second scenarios (the sole public sanction and the stand-alone action) will be discussed as to the conclusion we can find; namely that neither public fine nor private damages can act as the sufficient deterrence of the enforcement. In the final part, under the analysis of the third scenario of the follow-on action (and follow-on public enforcement) that may produce the risk of over-deterrence, it is suggested that three possible legal grounds are available to justify the adjustment of the fine according to the damages.

##### **a. Review of the theory of the optimal sanction**

The deterrence effect of public enforcement has been studied by *Montesquieu*, *Cesare Beccaria* and *Jeremy Bentham* in the early years. In 1968, the economist *Gary Becker* published his famous work *Crime and Punishment: An Economic Approach*, which has had a profound influence on the deterrence studies in the enforcement of the law. Following *Becker's* work, the optimal deterrence theory was introduced in the antitrust law field and a large number of law

and economic scholars have made important contributions to the topic of the optimal sanction and the enforcement of the competition law.<sup>740</sup>

There is a gain-based approach to setting the amount of the fine, which aims to create the deterrent effect by skimming off all the expected profits obtained by offenders. As an alternative approach, the harm-based sanction focuses on the harm of the infringement caused to the detriment of society and the internalization of the harm. The harm-based sanction may lead the offenders to restore the social harm caused by them and to retain the rest, which prevents the risk of deterring the behaviour generating more benefit than harm may be gained by the gain-based approach.<sup>741</sup> Furthermore, Polinsky and Shavell analysed the deterrent effect of the gain-based and harm-based sanctions and concluded that once the gain has been underestimated by the enforcement authorities, 'substantial harm can occur' in the society, because the offence is still be profitable and the social harm will not be considered by the offenders.<sup>742</sup> Most law and economics scholars are inclined to adopt the harm-based approach to analyse the optimal deterrence issue because it is more efficient.<sup>743</sup>

The optimal sanction is articulated by:

**Optimal sanction = expected harm × 1/ probability of detection.**

Optimal enforcement is based on the cost-minimization approach, i.e. reducing the harm of the violation and reducing the enforcement cost. The enforcement cost consists of the cost spent on the detection/investigation of the violation and the cost of imposing the punishment.<sup>744</sup> In Becker's opinion, the full detection is neither possible nor desirable.<sup>745</sup> In other words, a 100% detection of the entire violation and imposing sanction on every violation are not desirable for social welfare, because the enforcement is not free. Therefore, when establishing an optimal sanction policy to combat the illegal behaviour, it is necessary to seek the minimized social loss caused by the behaviour including damages and the enforcement cost (the cost of apprehension and conviction, the cost of punishment). He opined that the fine is superior to other forms of punishment such as imprisonment because it takes on both roles punishment and restoration with the lowest enforcement cost.<sup>746</sup> He concluded that the optimal deterrence and the

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<sup>740</sup> See W.M. Landes, 'Optimal Sanctions for Antitrust Violations', 50 *The University of Chicago Law Review* 652-678 (1983); see William H. Page, 'Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury', *The University of Chicago Law Review*, Vol. 47, No. 3 (Spring, 1980), 467-504; see William H. Page, 'The Scope of Liability for Antitrust Violations', 37 *STAN. L. Rev.* 145, (1985), 1445-1512; see Frank H. Easterbrook, 'Treble What?', 55 *Antitrust L. J.* 95-101, 1986; see Michael Kent Block, Frederick Carl Nold, Joseph Gregory Ssupraak, 'The Deterrent Effect of Antitrust Enforcement', *Journal of Political Economy*, *Journal of Political Economy*, Vol. 89 No.3 1981, 429-445; William Breit, Kenneth G. Elzinga, 'Private Antitrust Enforcement: The New Learning', *Journal of Law and Economics*, Vol. 28, No. 2, Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution (May, 1985), 405-443; see P. Buccirossi and G. Spagnolo, 'Optimal Fines in the Era of Whistleblowers. Should Price Fixers still Go to Prison?', in V. Goshal and J. Stennek (Eds.), *The Political Economy of Antitrust*, Elsevier, North Holland (2007)

<sup>741</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, (1968) *Journal of Political Economy*, 198-199; see William M. Landes, *Optimal Sanctions for Antitrust Violations*, (1983) 50 *University of Chicago Law Review* 652

<sup>742</sup> See A. Mitchell Polinsky, Steven Shavell, 'Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?', *Journal of Law, Economics, & Organization*, Vol.10, No.2, (Oct., 1994), 434-435

<sup>743</sup> See Warren F. Schwartz, 'An Overview of the Economics of Antitrust Enforcement', 68 *Geo. L. J.* (1979-1980), 1082-1083

<sup>744</sup> See Warren F. Schwartz, *supra* n 743, 1075

<sup>745</sup> See Gary S Becker, *supra* n 741, 169-217

<sup>746</sup> See Gregory J. Werden, Marilyn J. Simon, 'Why Price Fixers Should Go to Prison?', 32 *The Antitrust Bull.* 917-937 (1987), 937; Werden and Simon argued that the fine may produce less of a deterrent effect than imprisonment under some certain circumstance in a cartel case. Especially for the employees, they usually hate imprisonment very much and may prefer the fine as a penalty. But the debates on the imprisonment and fines are not the topic of this paper.

minimized loss will occur provided that the sanction imposed is sufficiently high and the probability of conviction closes to zero (if all parties are risk-neutral).<sup>747</sup>

Following the *Becker's* work, *Landes* discussed the optimal deterrence in the antitrust enforcement in his *Optimal Sanctions for Antitrust Violations* (1983).<sup>748</sup> He analysed the optimal enforcement of the antitrust law, which is followed by the net harm rule, namely the sanction should only deter the illicit behaviours that are inefficient and hence equals to the net harms suffered by the victims. The logic behind this is that the competition law should protect the competition, not the inefficient competitors.

Apart from the harm and the probability of detection, it should be acknowledged that both the public and private enforcement will bring a cost of error, including type I error (the authorities acquit the offenders) and type II error (the authorities punish the innocent parties). Under the type I error, the expected sanction will be lower and more individuals will choose to commit to the violation, whereas the expected sanction will be excessive under type II error and the risk of over-deterrence will suppress the efficient behaviour. Both of the two forms of error can lead to undesirable costs for the enforcement system, which are burdened by the society in the end. Therefore, the error cost is also one of the significant factors for the optimal enforcement.

## **b. Insufficient fine or damages**

### **aa) The sanction imposed by public enforcement in the EU and China**

#### **(1) EU**

The legal basis for the Commission to impose an administrative fine on the undertaking or association of undertakings that violates Articles 101 and 102 '*intentionally or negligently*' is Article 23 of the Regulation 1/2003.<sup>749</sup> Article 23 No. 2 Subsection 2 and 3 provide the ceiling of the fine which is 10% of the turnover of the preceding business year.<sup>750</sup> No. 3 provides that the Commission should decide the amount of fine based on '*the gravity and the duration of the infringement*'.<sup>751</sup> In addition to these, it appears that the Commission has a considerable discretion on the amount of fine.<sup>752</sup> The Commission released a *Guideline on the method of setting fine*<sup>753</sup> (*hereinafter*, Guideline on Fine) for the detailed methods regarding the magnification of the fine, including determination of a basic amount according to the value of sales of goods under the consideration of '*the gravity and the duration of the infringement*' and an adjustment of the basic amount pursuant to the aggravating or mitigating circumstances and factors related to the deterrence effect laid down in the Guideline on Fine. The Commission stated in the Guideline on Fine that the amount of the fine should not only reflect the severity of the infringement and punish the offenders, but that it can also deter the undertaking from committing into the illegal practice.<sup>754</sup> Firstly, the basic figure of the fine is determined by the

<sup>747</sup> See Gary S Becker, *supra* n 741, 183

<sup>748</sup> See William M. Landes, *supra* n 740

<sup>749</sup> Article 23 of Regulation 1/2003

<sup>750</sup> Article 23 No.2 Subsection 2 and 3 of Regulation 1/2003

<sup>751</sup> Article 23 No.3 of Regulation 1/2003

<sup>752</sup> Roger J. Van den Bergh, Peter D. Camesasca, (eds.), *European Competition Law and Economics: A Comparative Perspective*, (Intersentia nv, 2001), 307

<sup>753</sup> Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02, para 2

<sup>754</sup> Guideline on Fine, para 4, 6, 7

percentage of value of relevant sales (between 0-30% which are determined by the gravity of the infringement) through a multiplier of duration of the infringement.<sup>755</sup> Apart from the adjustment according to the aggravating or mitigating circumstances, the Commission can increase 15-25% of value of relevant sales (as entry-fee) to deter hard-core cartels, i.e. the horizontal price fixing, market sharing and output limitation agreements.<sup>756</sup> Secondly, the geographic scope of the value of sales is not limited to EEA. If it is wider than the scope of EEA, the share of the sales of each undertaking will be assessed according to its actual geographic scope, including the worldwide market, and will be further used to make the adjustment to reflect the sales within the EEA.<sup>757</sup> Thirdly, *'the gravity of the infringement'* will be determined pursuant to factors such as *'the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'*.<sup>758</sup>

## (2) China

The types of sanctions can be imposed by NDRC and SAIC according to the breach of Articles 13, 14 and 17 of AML (horizontal or vertical restraint, abuse of dominant position) include the fine and disgorgement of the illicit gains (confiscation of the illicit gain) according to Articles 46 and 47 of AML. The two competition authorities can impose a fine that accounts for 1% to 10% of the turnover of the preceding business year on the agreement that has already been enforced and the abuse of the dominant position.<sup>759</sup> It not only provides the ceiling of the fine (10% of the turnover), but also addresses that the minimum fine should meet at least 1% of the turnover. Neither AML nor Provisions (issued by NDRC or SAIC for the application of AML) define a clear geographical boundary of the turnover of the undertaking, especially the global corporation. At the existing decisions issued by NDRC, the fine was calculated on the basis of the turnover in China's market, not on the global scale.<sup>760</sup> However, considering the experience of the public enforcement, there are only two decisions which were issued by NDRC relating to the global corporation and basically all the cases solved by SAIC are in relation to the national firms. Therefore, it is hard to state that the fine will invariably be quantified on the Chinese market, not worldwide. In addition, the authorities can impose a fine no more than RMB ¥ 500,000 on the undertaking against the restrictive agreement that has not been enforced.<sup>761</sup> Fines on the association which committed to the violation and organized its members to reach a restrictive agreement amount to no more than RMB ¥ 500,000.<sup>762</sup>

In addition to Articles 46 and 47 regarding the amount of the fine on the restrictive agreement and abuse of the dominant position, NDRC and SAIC should also follow Article 49 when using their discretion on setting the amount of the fine, that is *'nature of the infringement, the level of gravity and the duration'*.<sup>763</sup> For instance, NDRC summed up in the final of the *Qualcomm Incorporated* decision that *'the essence of the abusive practice of the undertaking is severe, the level is profound and the duration is relatively long'*.<sup>764</sup> Thus NDRC imposed a fine of 8% of

<sup>755</sup> Guideline on Fine, para 21

<sup>756</sup> Guideline on Fine, para 25, 27-29

<sup>757</sup> Guideline on Fine, para 18

<sup>758</sup> Guideline on Fine, para 22

<sup>759</sup> Article 46 Subsection 1

<sup>760</sup> For example, in the settled case *Qualcomm Incorporated* (2015), NDRC addressed in its decision that the authority (NDRC) decides to impose a fine of 8% of the turnover in PR China, RMB ¥ 6,088Millions in total. See [http://jjs.ndrc.gov.cn/fjgld/201503/t20150302\\_666170.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html). The same can also be found in earlier cases, such as *Japanese auto parts price fixing cartel* (2014). See <http://jjs.ndrc.gov.cn/fjgld/>

<sup>761</sup> Article 46 Subsection 1 of AML

<sup>762</sup> Article 46 Subsection 3 of AML

<sup>763</sup> Article 49 of AML

<sup>764</sup> See *Qualcomm Incorporated* (2015) [http://jjs.ndrc.gov.cn/fjgld/201503/t20150302\\_666170.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html)

the turnover of Qualcomm Incorporated in Chinese market in 2013, which is a relatively high fine.<sup>765</sup>

Apart from a fine, another sanction tool that can be used by NDRC and SAIC is the disgorgement of illicit gain (confiscation of illicit gain) obtained by the undertaking through the restrictive agreement or the abuse of dominant position according to Articles 46 and 47.<sup>766</sup> NDRC applied the disgorgement of illicit gain in case *LCD price cartel* and case *Shandong Medicine*.<sup>767</sup> SAIC imposed the disgorgement in case *Dongfang Water Transportation*(2015), *Huizhou Yiyuan Purified Water Company Limited* (2013), *Henan Anyang City Used Vehicle* (2012), *Jiangsu Taihe City LPG* (2011) and *Lianyungang City Building Materials and Building Machinery Industry Association*(2010).<sup>768</sup>

**Table 5: complementing the table in *Fines for breaking EU Competition law*<sup>769</sup> with Chinese content**

Fine on undertaking	EU	China
Basic fine	Percentage of value of relevant sales (0-30%) × Duration + 15%-25% of value of relevant sales(hard-core cartel)	1%-10% of the turnover determined by nature of the infringement, the level of gravity and the duration
Aggravating factors	Ring leader, repeat offender or obstructing investigation	
Mitigating factors	Limited role or conduct encouraged by legislation	The agreement has not been implemented: up to RMB ¥ 500,000
Ceiling of fine	10% of worldwide turnover	10% of turnover in Mainland China
Leniency	100% for first reporter, Up to 50% for next, 20-30 for third Up to 20% for others	NDRC:100% for first reporter, 50%-100% for the second reporter, up to 50% for others; SAIC
Settlement	10%	None
Other likely reduction circumstances	Inability to pay	None

### (3) Insufficient fine for the optimal sanction

#### aaa) Literature reviews: empirical studies

Taking the cartel as an example, *Connor* and *Lande* observed 647 samples of average overcharges to conclude that the median cartel overcharge of all types of cartels is 25% (17%-

<sup>765</sup> See *Qualcomm Incorporated* (2015) [http://jjs.ndrc.gov.cn/fjgld/201503/t20150302\\_666170.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html)

<sup>766</sup> Articles 46 and 47 of AML

<sup>767</sup> The lists of cases can be found in Appendix. The decisions and related information is available at: <http://jjs.ndrc.gov.cn/fjgld/>

<sup>768</sup> The lists of cases can be found in Appendix. The decisions and related information is available at: <http://www.saic.gov.cn/zwgk/gggs/jzzf/>

<sup>769</sup> European Commission, *Fines for Breaking EU Competition Law*, available at: [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf)

19% for domestic cartel and 30%-33% for international cartels).<sup>770</sup> Connor and Bolotova analysed the 800 observations of price-fixing cartels during the last 250 years and found that the median number of the overcharge rate is 19%.<sup>771</sup> The data drawn from the research by Connor and Helmers was based on 283 international hard-core cartels during 1990 to 2005, which showed that the overcharge rate in North America and the EU is 24%.<sup>772</sup> According to the academics, even the 10% of the turnover as the highest amount of fine cannot achieve the optimal deterrence as regards the gain obtained from the cartel. Smuda addressed in his Article that the expected maximum fine in the EU (under an average cartel duration of 5.7 years and a mean overcharge rate of 21.9%) is 11.35%; that is far lower than the overcharge rate of 21.9%.<sup>773</sup> He further indicated that the optimal fine should equate to 374.49% of affected sales.<sup>774</sup>

In addition, the basic amount of the fine set by the EU's and Chinese competition authorities is determined by the turnover of the undertaking, which has no close connection with the gain obtained from the infringement and the harm caused to society.<sup>775</sup> Moreover, Catherine Craycraft / Joseph L. Craycraft / Joseph C. Gallo found that the actual fine is usually lower than the optimal fine since the authorities or the courts will consider the undertaking's ability to pay and the impact of the fine on society.<sup>776</sup>

### **bbb) Limits on the amount of fine: institutional perspective**

Three possible limits of the amount of fine that may essentially probably show the conclusion that the sole public sanction could be under-deterrence are a 10% ceiling on fines, the inability to pay and the insufficient detection rate. These limits lead to the result that the current amount of fine can hardly achieve the appropriate deterrence.

#### **10% ceiling of fines and Inability to pay**

The legal maximum of the fine in both the EU and China is 10% of the total turnover in the year prior to the adoption of the decision. This 10% of the turnover as the ceiling of the fine aims to avoid the fine getting too large in order to avoid the undertaking facing the danger of bankruptcy.

In the EU, the Commission has a duty to assess whether the company is unable to afford the fine upon the request of the company, after the fine has been set, which is called as '*Inability to Pay*' (hereinafter '*ITP*').<sup>777</sup> The ITP is based on paragraph 35 of the Guideline on fines, which provides that the reduction '*on the basis of objective evidence that imposition of the fine ... would irretrievably jeopardise the economic viability of the undertaking concerned and cause*

<sup>770</sup> See John M. Connor and Robert H. Lande, 'Cartel Overcharge and Optimal Cartel Fines', in: 3 *ISSUES IN COMPETITION LAW AND POLICY* 2203 (ABA Section of Antitrust Law 2008), 2215

<sup>771</sup> See John M. Connor, Yuliya Bolotova, 'Cartel Overcharges: Survey and Meta-Analysis', *International Journal of Industrial Organization* 24.6(2006), 1134

<sup>772</sup> See John M. Connor, C. Gustav Helmers, 'Statistics on Modern Private International Cartels', AAI Working Paper No. 07-01, 38

<sup>773</sup> See Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', *Journal of Competition Law & Economics*, 10(1), 2013, 83-84

<sup>774</sup> See Florian Smuda, *supra* n 773, 85; the author stated that '*calculating with a probability of detection of 33 percent, a mean cartel overcharge of 21.9 percent and an average cartel duration of 5.7 years, the optimal fine for an average cartel should amount to  $(3 \times 5.7 \times 21.9\%) = 374.49\%$  of affected sales.*'

<sup>775</sup> Roger J. Van den Bergh, Peter D. Camesasca, (eds.), *supra* n 752, 315-316

<sup>776</sup> See Catherine Craycraft, Joseph L. Craycraft, Joseph C. Gallo, 'Antitrust Sanctions and a Firm's Ability to Pay', *Review of Industrial Organization* 12, 1997, 181-182

<sup>777</sup> Joaquín Almunia, Janusz Lewandowski, INFORMATION NOTE of Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines, SEC(2010) 737/2, Brussel, 12 June 2010

*its assets to lose all their value*'.<sup>778</sup> The most crucial part of the ITP is to assess whether the fine would irretrievably jeopardize the economic viability of the undertaking and cause its assets to lose all their value, which require a test of '*the profitability, capitalization, solvency and liquidity*' of the undertaking.<sup>779</sup> The Commission interpreted the expression '*lose all their value*' as the danger of bankruptcy of the undertaking caused by the fine and '*the jobs being lost and assets being sold separately at substantially discounted prices*'.<sup>780</sup>

It seems that the legislators are not willing to face the risk of bankruptcy which could reduce the number of firms and result in less competition in one industry. It may further harm the interest of innocent persons who do not engage into the decision-making of the undertaking in connection with the violation, including employees and shareholders.<sup>781</sup> The 10% ceiling of fine and the assessment of ITP on the basis of the prevention of an undesirable consequence of the bankruptcy can justify the limitation of the deterrent effect of the fine and the adjustment of the fine.<sup>782</sup> The opposite opinion argued that although it is possible that the optimal fine will incur the danger of bankruptcy and decrease the number of competitors in one industry, the objective of the deterrence should not be sacrificed because the optimal fine calls for a higher level of compliance of the undertakings in other industries which is consistent with the ultimate objectives of the competition law for a long time.<sup>783</sup> Another argument addressed that the bankruptcy is not always undesirable and went on to state that if the bankruptcy is efficient and the assets of the undertakings could be sold soon after, the damages to the competition of the industry will be small or even possibly close to zero.<sup>784</sup>

### Low detection rate

The detection rate can be roughly divided into the probability to identify an illicit behaviour and the probability of conviction.<sup>785</sup> First of all, the detection rate will be influenced largely by the enforcement costs. It can be imaged that the detection rate will be restricted where the input of financial and manpower resource into the enforcement is lacking. Secondly, whether the assessment of the detection rate is difficult because the infringement of the competition law is sometimes concealed in as much as the victims would not discover that they sustained a loss, which is different from the crime such as robbery, theft. From the experience of the enforcement launched by the Commission or Chinese NDRC/SAIC, it can be found that the settled cases with the final decisions are very limited every year. According to the data from the Commission, 114 cartel cases were decided between 1990 and 2015. From 2010 to 2015, the numbers of cases decided by NDRC and SAIC are 11 and 21 respectively, although rough statistics (due to the incomplete decisions released).

**Table 6: cartel cases decided by the European Commission (1990-2015)**<sup>786</sup>

Period	Cases decided
1990-1994	10
1995-1999	10
2000-2004	30
2005-2009	33
2010-2014	30
++2015++	1
Total	114

<sup>778</sup> Guideline on fine, para 35

<sup>779</sup> Joaquín Almunia, Janusz Lewandowski, SEC(2010) 737/2, Brussel, 12 June 2010, para 7

<sup>780</sup> Joaquín Almunia, Janusz Lewandowski, SEC(2010) 737/2, Brussel, 12 June 2010, para 9

<sup>781</sup> See Catherine Craycraft, Joseph L. Craycraft, Joseph C. Gallo, *supra* n 776, 175

<sup>782</sup> See Paolo Buccirossi, Giancarlo Spagnolo, *supra* n 740, 13

<sup>783</sup> See Paolo Buccirossi, Giancarlo Spagnolo, *supra* n 740, 10

<sup>784</sup> See Paolo Buccirossi, Giancarlo Spagnolo, *supra* n 740, 13

<sup>785</sup> See Kai Hüschelrath, *supra* n 702, 10-13

<sup>786</sup> The data can be found in the DG Comp's Website: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

**Table 7: cases decided by SAIC and NDRC (2010-2015) [including all the horizontal and vertical agreements]<sup>787</sup>**

Period	Cases decided by SAIC	Cases decided by NDRC
2010	1	1
2011	1	3
2012	6	0
2013	5	2
2014	6	1
2015	2	1
Total	21	11

It is hard to make an accurate evaluation of the deterrent effect created by the existing level of fine on the illegal practices. One of the evident difficulties is that it is unclear whether the detected cases suffice to cover most of the infringement in the market, or they are just '*the tip of iceberg*'. Moreover, it is also not clear whether competition authorities can gather sufficient evidence to prove a proportion of the detected cases and how much percentage it is. Some scholars have attempted to make an estimation of the detection rate. The general believe regarding the detection rate of the cartel is that is between 10%-33%.<sup>788</sup> Bryant and Eckard evaluated that the detection rate of the cartel is at most between 13% and 17% in the US.<sup>789</sup> As a comparison, Polinsky and Shavell stated the likelihood of an arrest in burglary was 13.8% in 1997, and in automobile theft was 14.0%.<sup>790</sup>

### **ccc) Additional factors: enforcement cost and error cost**

Apart from the amount of fine and the detection rate, other noticeable factors that may have an effect on the deterrence include the enforcement cost and the error costs. The optimal enforcement requests a total cost minimization resulting from the infringement, including the minimized direct cost of the infringement and the minimized enforcement cost. It is evident that the direct cost of the infringement (i.e. the harm caused to society) will increase provided that the enforcement cost is too low, on the one hand. The direct cost of the infringement, taking the cartel as an example, is likely to include the overcharge suffered by the purchasers and the loss due to the volume effect (deadweight loss). Furthermore, the cartel may cause dynamic injuries to the consumer welfare, such as the harm to the innovation.<sup>791</sup> In sum, if the cost of the public enforcement is unreasonably high, the minimization of the total social cost cannot really be achieved.

Public enforcement can be divided into two proceedings: detection (including the detection and the conviction) and intervention. As regards the detection, it is expensive for competition authorities to procure the (sufficient) information of the concealed infringement. Several common methods that can facilitate the information procurement and spare the cost of

<sup>787</sup> The data has been collected from the released decision by the two authorities from their website, which could be not complete. The Chinese version can be found here: <http://jjs.ndrc.gov.cn/fjgld/> (Price supervision and inspection and anti-Monopoly Bureau of NDRC) and <http://www.saic.gov.cn/zwgk/gggs/jzzf/> (Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC)

<sup>788</sup> See John M. Connor, Robert H. Lande, 'The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies', 51 *Antitrust Bull.*, 2006, 987; see Mark A. Cohen, David T. Scheffman, 'The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?', 27 *AM. CRIM. L. REV.* (1989), 342

<sup>789</sup> See Peter G. Bryant, E. Woodrow Eckard, 'Price Fixing: The Probability of Getting Caught', *The Review of Economics and Statistics*, Vol. 73, No. 3 (Aug., 1991), 535

<sup>790</sup> See A. Mitchell Polinsky, Steven Shavell, 'The Economic Theory of Public Enforcement of Law', *Journal of Economic Literature*, Vol. 38, No. 1 (Mar., 2000), 71

<sup>791</sup> See Daniel A. Crane, 'Optimizing Private Antitrust Enforcement', 63 *Vand. L. Rev.* 675-723 (2010), 688-689

enforcement in both the EU and China are complaints, whistle-blowers, leniency program, industry monitoring and others (such as market screening).<sup>792</sup> On the intervention, as *Becker* discussed, fines are the best enforcement instrument with the lowest enforcement cost, compared to imprisonment.<sup>793</sup>

The occurrence of the error in the enforcement system may result in under- or over-deterrence to the undertakings, first of all.<sup>794</sup> Either a type I or type II error is likely to make the consequence of a commercial behaviour extremely difficult to be predicted for the undertakings, which may further lead to the inefficient allocation of resources because the objectives of competition law have not been applied and realized. In parallel, the undertakings that comply with the law bear an unfair risk in the market. The errors in the public enforcement may influence the follow-on civil action by either reducing the incentives to sue (type I) or create the wrong incentive to sue (type II). The benefits of reducing the error that would occur mainly stem from the higher level of compliance to the law.<sup>795</sup>

The final decision is made by the authorities based on the increasingly accurate information; a few errors will occur. Increasing the cost of enforcement may help to decrease the risk of errors to some degree. Apart from the leniency program and the settlement programs, the independence of competition authorities or courts is also an imperative factor for the likely error cost. Non-independence of the authorities or the courts implies that they will be stopped by other government department or the parties in the market when making the investigation and the decision.

#### **(4) Insufficient damages to ensure the optimal sanction**

Insufficient private action and private damages can be found in two perspectives: firstly, compared with treble punitive damages, the full compensation cannot make up the 30% detection rate (but it should be noted that the application of punitive damages has some insurmountable problems); secondly, the nature of private action results in the gap between it and the minimized social loss.

#### **aaa) Full compensation in EU and China**

The amount of the damages will influence the cost-benefit analysis to a certain degree. The level of damages determines the level of punishment in private enforcement and generates the incentive of the litigation for private parties.<sup>796</sup> The limits of the full compensation firstly embodies private action can only being able to compensate for basically two types of static injuries, including the wealth transfer (overcharges) and part of the deadweight loss (the injuries resulted from the volume effect). As regards the dynamic injuries, there is an opinion that the dynamic injuries such as the harm to the innovation can never be recovered by private action.<sup>797</sup>

More importantly, on the deterrent effect, the logic behind the treble damages is that the approximate probability of detection of the antitrust violations is 30%, which implies the treble damages provide an additional deterrence that cannot be found in the full compensation. Treble damages in US antitrust action are governed by Section 4 of *the Clayton Antitrust Act* (1914)

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<sup>792</sup> See Kai Hüschelrath, *supra* n 702, 13-14

<sup>793</sup> See Gary S Becker, *supra* n 741, 208

<sup>794</sup> Hans-Wilhelm Krüger, *Öffentliche und private Durchsetzung des Kartellverbots von Art. 81 EG: Eine rechtsökonomische Analyse*, DUV Deutscher Universitäts-Verlag 2008, 178-179

<sup>795</sup> See Warren F. Schwartz, *supra* n 743, 1078

<sup>796</sup> See Warren F. Schwartz, *supra* n 743, 1083

<sup>797</sup> See Daniel A. Crane, *supra* n 791, 688-689

that ‘any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.’<sup>798</sup> The logic behind treble damages claimed in US antitrust litigation is that the probability of detection of offences cannot reach 100%. Generally, according to economics theories, it is only 10%-33%.<sup>799</sup> Therefore, the treble damages aim to deter all cartels, considering that only one third of the cartels have been detected.<sup>800</sup>

However, the application of treble damages in the EU and China could be difficult. Firstly, a notable difference between the US and the EU/China enforcement system is whether there is a strong public enforcement acting as the major deterrent effect provider. In the US, the private litigation is always takes on the dominant position in the enforcement system (almost 90% of antitrust cases are private action). Before the Directive on damages action, the Commission and the competition authorities in most Member States in the EU have implemented effectively the competition law effectively for decades. In China, the similar situation describes that although AML has prescribed the concurrence of the public and private enforcement in 2008, it should be noted that the competition authorities NDRC and SAIC have applied the antitrust provisions in *Price Law* and in *Anti-Unfair Competition Law* since the 1990s.

Secondly, as regards the second question, the punitive damages can rarely be found in China or most of the EU Member States. According to *Ashurst Report*, forms of damages in most of Member States are compensatory and restitutionary damages, whereas the punitive or exemplary damages can only be found in the UK, Ireland and Cyprus.<sup>801</sup> Even in these three States, the punitive damages are rarely awarded.<sup>802</sup> The absence of the legal ground for the punitive damages in most of Member States may present a major reason for the EU to reject the punitive damages in antitrust actions. The *Ashurst Report* further mentioned that the national reporters in the Member States without punitive damages responded that the punitive damages are inconsistent with the present restitutionary-compensatory nature of damages.<sup>803</sup> In China, the situation is similar. In the civil law, the principal form of damages is the compensatory damages. Punitive damages can only be found in special rules in Tort Law, Consumer Protection Law. Article 47 of the Tort Law provides that the injured persons have the right to claim punitive damages where the offenders knowing of any defect of the product continue to produce or sell the product and the defect causes a death or any serious harm to the health of injured persons.<sup>804</sup> Besides, Article 55 of the *Consumer Protection Law* provides that the undertakings committed into the fraudulent activities in supplying products or service shall undertake the treble damages upon the request of consumers.<sup>805</sup> The punitive damages are not prescribed in the Judicial Interpretation on AML. In contrast, in the US, §4 of Clayton Act is the basis of the punitive damages, which aims not only at encouraging antitrust action, but also at increasing the deterrence of the action. Treble damages stem from the English law and have special historical background in the US private enforcement of the antitrust law. In the early years of the Sherman Act (1890s), there was no budget for the public enforcement, which generated private actions as a requisite substitute.<sup>806</sup> And this tradition has been preserved until today, even with the limited public enforcement in the system. This type of historical background does not exist in either the EU or China. Both of the regimes have a relatively strong public enforcement.

<sup>798</sup> Clayton Act, 15 U.S.C. § 15(a) (2009)

<sup>799</sup> See John M. Connor, Robert H. Lande, *supra* n 788, 987; see Mark A. Cohen, David T. Scheffman, *supra* n 788, 342

<sup>800</sup> See Robert H. Lande, ‘Five Myths About Antitrust Damages’, 40 *U.S.F. L. Rev.*, 2005-2006, 656

<sup>801</sup> See Denis Waelbroeck et al, *supra* n 478, 84

<sup>802</sup> See Denis Waelbroeck et al, *supra* n 478, 84

<sup>803</sup> See Denis Waelbroeck et al, *supra* n 478, 84

<sup>804</sup> Article 47 of the Tort Law

<sup>805</sup> Article 55 of the Consumer Protection Law

<sup>806</sup> See D.I. Baker, ‘Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?’, *Loyola Consumer Law Review* 16 (2004), 382

### bbb) Inefficient and excessive private litigation for the optimal sanction

Considering optimal enforcement and the social cost minimization, there is an argument stating that the benefit of the private action could be divergent from the social benefit. In other words, encouraging some of the private litigations may be undesirable for the social cost minimization. Like the claimant, the defendant would trade-off the cost of precaution (to prevent or minimize the damages) and the amount of damages plus the cost of defence. In respect of the social cost minimization, it should be noted that both litigants and the judicial system burden the cost of the private litigation. Therefore, the social cost consists of the litigation costs sustained by the litigants, by the judicial system and the harm resulted from the violation.

*Shavell* discussed the socially excessive and socially inadequate scenarios of the private litigation and further concluded that there is ‘*no necessary connection between the bringing of suits and the social value of suits*’.<sup>807</sup> He indicated that the litigation is excessive where the total litigation cost exceeds the net benefit of the deterrence caused by the litigation.<sup>808</sup> This is because the big litigation cost plus the precaution cost is used to pursue a small reduction of harm as a result of the precaution of the defendant. (The compensation can be deemed as the wealth transfer between litigants that does not bring any social benefit itself.) He further addressed that it is socially advantageous where the harm exceeds the precaution cost plus the reduction of harm caused by the deterrence of the litigation.<sup>809</sup> Therefore, he concluded that this gap should be regulated in order to achieve the minimization of the social cost.<sup>810</sup>

It followed that *Stephenson* summarized the three major reasons of the divergence between the private litigation and the social cost minimization by referring to the opinion of *Shavell*.<sup>811</sup> Firstly, the enforcement cost of the private enforcement is a negative externality that cannot be offset by the claimant.<sup>812</sup> Secondly, the private injured persons would consider about their benefit and cost rather than the social benefit and cost before filing the litigation, which differs from the public enforcement.<sup>813</sup> Finally, it is likely that the claimant brings a non-meritorious action which is based on the bad purpose, such as ‘*strike suits*’ that are forcing the defendant to reach a settlement with him.<sup>814</sup> Or there is a blackmail settlement, which lead to the under-deterrence, because the price paid by the offenders for the blackmail is lower than the appropriate punishment that they actually deserved.<sup>815</sup>

<sup>807</sup> See Steven Shavell, ‘The Fundamental Divergence between the Private and the Social Motive to Use the Legal System’, *The Journal of Legal Studies*, Vol. 26, No. S2 (June 1997), 584

<sup>808</sup> See Steven Shavell, *supra* n 807, 581-583; he cited the assumption that the damages of the infringement are \$1000 and the litigation costs of claimant and defendant are \$300 respectively. The defendant’s precaution cost is \$150. If the precaution cost incurs a reduction in the probability of harm is 50%, the total social cost = 150 + 1600\*50% = 950, which is smaller than \$1000 damages and the litigation is efficient. If the precaution cost incurs a reduction in the probability of harm amounting to 75%, the social cost = 150 + 1600\*75% = 1350, which is larger than the \$1000 damages and the litigation should not be brought under the social cost minimization.

<sup>809</sup> See *Supra*, 583-584; he assumed this scenario that the damages are \$100 and the litigation cost is \$300. If there is no litigation, the social cost is \$100. Assuming the precaution cost \$1 and it can incur a substantial reduction in the probability of harm that is 10%, the social cost = 100 + 700\*10% = 71, which is smaller than \$100 social cost without litigation. Hence, the litigation will bring the benefit to the social welfare, but injured persons may reluctant to sue because the litigation cost far exceeds the damages.

<sup>810</sup> See Steven Shavell, *supra* n 807, 586

<sup>811</sup> See Matthew C. Stephenson, ‘Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies’, *Virginia Law Review*, Vol. 91, No. 1 (Mar., 2005), 93-173

<sup>812</sup> See Matthew C. Stephenson, *supra* n 811, 114; see Steven Shavell, *supra* n 807, 584

<sup>813</sup> See Matthew C. Stephenson, *supra* n 811, 115

<sup>814</sup> See Matthew C. Stephenson, *supra* n 811, 115

<sup>815</sup> See William M. Landes, Richard A. Posner, ‘The Private Enforcement of Law’, *The Journal of Legal Studies*, Vol. 4, No. 1 (Jan., 1975), 42

*Shavell* indicated that the undesirable litigation should not be encouraged by the public policies by citing examples including the legal fee to the poor victims in the automobile accident action.<sup>816</sup> The automobile accident action is an inefficient action because the high amount of damages will not induce an appropriate deterrence against the violation. The legal fee virtually subsidizes this undesirable action. Moreover, he also addressed the compensation as a goal of the litigation and stated that the insurance system is more efficient than the judicial system to realize the compensation.<sup>817</sup>

### c. Reconciliation of fine and the damages

#### aa) Need to reconcile the fine and damages

Following on from the discussion above, either the sole public sanction or the stand-alone action for damages has its limits as regards the deterrence. Hence, the follow-on action (and follow-on public enforcement) may probably provide the likelihood of a sufficient deterrent effect, which needs to be reviewed in this part. But an excessive punishment including the damages and the fine could also be over-deterrent and therefore cause the inability to pay of the violators. Over-deterrence would not only deter the legal commercial behaviour, but also impose the undue burdensome on the undertakings which may incur the inability to pay and furthermore the danger of bankruptcy. Therefore, there is a need to reconcile the fine and damages in the case of the co-existence of public and private sanction.<sup>818</sup> A more important problem (especially in China) is, it is possible that the violators have no ability to afford the civil compensation after the large amount of fine, which would definitely impair the injured person's right to full compensation. In China, several cases such as *Yian Keji* (亿安科技案) or *Lantian* (蓝田造假案) that are based on the breach of the Security Law have been found that the injured person cannot obtain the entire or even partly compensation after the administrative fine imposed by the authority. It can be predicted that the similar problem could also occur in the enforcement of competition law, which asks for further adjustment of the amount of the punishment.

<sup>816</sup> See Steven Shavell, *supra* n 807, 592-593

<sup>817</sup> See Steven Shavell, *supra* n 807, 594

<sup>818</sup> See Kai Hüscherlath, ZEW-Centre for European Economic Research Discussion Paper 29 (2013), 8; *Hüscherlath* introduced a formula to articulate such reconciliation between the fine and damages which is based on the gain-based approach in order to achieve the optimal deterrence in the follow-on action, i.e.

$$\text{Min } F = (G/a) - D$$

*a*: Probability of conviction of offenders

*G*: Gains obtained from the infringement

*F*: Fine imposed by the public enforcement

*D*: Damages paid to the injured claimant

When the gain obtained by the undertaking and the probability of detection is fixed, the amounts of fine and damages need to be reconciled with each other to prevent the over- and under-deterrence.

Besides, the need to reconciliation of the fine and damages was discussed by *Thorsten Mäger* and *Thomas B. Paul*'s 'The Interaction of Public and Private Enforcement – The Calculation and Reconciliation of Fines and Damages in Europe and Germany', which proposed the insightful opinions of the application of the proportionality principle and the *non bis in idem* principle on this issue in Europe and Germany. In this part, the attention will be paid on the introduction of the related Chinese rules so as to examine whether it is possible to allow an adjustment of fine in both EU and China in the context of the prevention of 'inability to pay'. *Thorsten Mäger, Thomas B. Paul, The Interaction of Public and Private Enforcement: The Calculation and Reconciliation of Fines and Damages in Europe and Germany*, in: *Hüscherlath and Schweitzer* (eds.), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, (Springer-Verlag Berlin Heidelberg 2014), 90-91

## bb) Adjustment of the fine

There are two possible circumstances for the adjustment of the fine: firstly, the public investigation and the sanction imposed are triggered by the private action, i.e. the competition authorities have already known of the existence of the payment of damages; secondly, although the public proceeding and fine decision occurred before the private action, the infringer can apply to the competition authorities for a refund of the part of the fine after the payment of damages.

First of all, as the first circumstance that public enforcement is incurred by the stand-alone action, the competition authorities have the competence and reason to decrease the level of the fine accordingly. In the case *Pre-Insulated Pipe cartel*, the compensation was deemed as '*the only extenuating circumstance*' for setting the fine.<sup>819</sup> Hence, the Commission applied a reduction of ECU 5 million to the basic amount.<sup>820</sup> Concerning a similar reduction (a reduction of EUR 300,000) in the case *Nintendo*, the infringer has already paid substantial compensatory damages to the third parties identified in the Statement of Objections as the injured persons.<sup>821</sup> Article 18 (3) of the Directive provides that '*a competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor*'.

In China, there is no ground governed by AML and the Provisions related to the public enforcement laid down by SAIC or NDRC for the reconciliation of the fine and damages, nor such a rule can be found in the Directive.

Secondly, in the case of a follow-on action, the competition authorities find it hard to predict exactly whether there will be the subsequent civil actions brought by the private parties. Therefore, an *ex-ante* adjustment is not reasonable and justified. The question that needs to be examined is whether there is a possibility for the *ex-post* adjustment, or a refund of part of the fine. It implies that whether the infringers have the right to apply the refund of the fine from the competition authorities after the payment of the damages. A special example is, Section 34(2) sentence 2 of German ARC prescribes that the undertaking can request the reimbursement of its fund in the amount of the damages paid where the benefits have already been skimmed off.<sup>822</sup>

Both in China and the EU, there is a need to discuss reconciliation of the fine and damages in the enforcement of the competition law in the absence of the necessary rules related. Three possible legal grounds are analysed below considering the likelihood of inability to pay of the violators.

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<sup>819</sup> Case No IV/35.691/E-4 *Pre-Insulated Pipe Cartel*, OJ L 24 of 30 January 1999, p.1, 64 para 172

<sup>820</sup> Case No IV/35.691/E-4 *Pre-Insulated Pipe Cartel*, OJ L 24 of 30 January 1999, p.1, 64 para 172

<sup>821</sup> Case No COMP/35.587 PO *Video Games*. OJ L 255 of 8 October 2003, p. 33, 96 para 440-441; both of the cases *Pre-Insulated Pipe Cartel* and *Nintendo* were also introduced in Thorsten Mäger and Thomas B. Paul, *supra* n 818, 90.

<sup>822</sup> Section 34(2) sentence 2 of GWB. In Germany, Section 34 of ARC provides the power of cartel authorities to skim off the benefits obtained by the undertakings from the infringement. Section 34(2) sentence 1 provides that the skimming off benefit will not be applied where the economic benefits has already paid for the damages, the fine or the forfeiture. In addition, the compensation to the third parties can be deemed as a mitigating circumstance (*mildernde Umstände*) of the level of fine in the Fining Guideline of the Federal Cartel Office. The same criterion did not appear in the new 2013 Fining Guideline. Bekanntmachung Nr. 38/2006 über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) gegen Unternehmen und Unternehmensvereinigungen, recital 17; Leitlinien für die Bußgeldzumessung in Kartellordnungs-wsuprarigkeitenverfahren, Bundeskartellamt, 25. Juni 2013, para (16).

## (1) Priority of the civil liability

The legal ground of the adjustment of the fine in China should be examined. The Chinese Criminal Law provides that the civil liability has priority over the fine and the confiscation based on the same event.<sup>823</sup> It should be noted that such a priority is not considered as a mitigating factor to set the fine, but a priority in the enforcement. If the parties are not able to pay for both of the fine and the damages at the same time, they should pay for the compensation first.

More importantly, in Chinese tort law, Article 4 confirmed the priority of civil compensation, in which Subsection 1 provides that *'where a tortfeasor shall assume administrative liability or criminal liability for the same conduct, it shall not prejudice the tort liability that the tortfeasor shall legally assume'*.<sup>824</sup> Subsection 2 provides that *'where assets of a tortfeasor are not adequate for payments for the tort liability and administrative liability or criminal liability for the same conduct, the tortfeasor shall first assume the tort liability'*.<sup>825</sup> Such a rule can also be found in the Company Law (2014) and the Securities Law (2013). Article 214 of the Company Law provides that *'where the company violates the provisions of this Law and shall assume the civil compensatory liability, the fine and pecuniary penalties, it shall assume the civil compensatory liability first if its property is not enough to pay for all of these'*.<sup>826</sup> Moreover, Article 232 of the Securities Law prescribes a similar rule, namely if the property of the party cannot afford to pay the civil liability, the fine and the pecuniary penalties in the same time, the civil liability has priority.<sup>827</sup>

Under the first circumstance, the compensation decision precedes the fine decision, one may wonder whether the compensation can be introduced as a mitigating factor to set the amount of fine into the Provisions laid down by the competition authorities. Under the second circumstance, such reimbursement of the refund cannot be found not only in AML, but also in Tort law, Company law or Securities Law. The injured person of the antitrust damages action that is based on the tortious proceeding can invoke Article 4 of the Chinese Tort Law to request their priority. In addition, it is appropriate where the competition authorities could permit an *ex-post* refund of the fine as to ensure the compensation. Setting a rule in the Provisions of the competition authorities allowing an *ex-post* refund is necessary for both the avoidance of the danger of bankruptcy and the safeguard of the full compensation. Some Chinese scholars suggested that the authorities can be joined into the civil action as the third party when the administrative penalty has already been enforced and meanwhile the injured person should be allowed with the right to sue against the authority so as to ensure the priority principle.<sup>828</sup> As regards the proposition that the interested parties especially the injured persons should be awarded with more opportunities the claim their interest during the public enforcement, it could be difficult because the antitrust enforcement is normally conducted in secret.

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<sup>823</sup> Article 36 of Criminal Law

<sup>824</sup> Article 4 Subsection 1 of Tort Law

<sup>825</sup> Article 4 Subsection 2 of Tort Law

<sup>826</sup> Article 214 of Company Law

<sup>827</sup> Article 232 of Securities Law; For example, although Chinese Securities Law provides the priority of the civil liability, it is hard to apply in practice. The Securities Law requests the fine decision from the administrative authorities as a requisite pre-condition of the private damages action. Several cases including *Yan Keji* (亿安科技案) or *Lantian* (蓝田造假案) showed that it is hard for the injured person to claim damages after the heavy fine without such a refund mechanism.

<sup>828</sup> The 'judicial interpretation of the tort law' group of the civil and commercial law study center of Renmin University (中国人民大学民商事法律科学研究中心“侵权责任法司法解释研究”课题组, *zhongguo renmin daxue minshangshi falv kexue yanjiu zhongxin* 'qinquan zeren sifa qinquan zeren sifa jieshi yanjiu' ketizu), 'The Proposition of the Draft of the Judicial Interpretation of the Tort Law of People's Republic China' (中华人民共和国侵权责任法司法解释草案建议稿, *zhonghua renmin gonghe guo qinquan zeren fa sifa jieshi caoan jianyi gao*), Hebei Law Science, Vol. 28 No.11 2010, Article 8 para 2.

## (2) Principle of proportionality

The principle of proportionality implies that the fine should be proportionate to the violation. In the EU, the principle of proportionality is governed by Article 49(3) of the EU Charter and Article 6 ECHR.<sup>829</sup> The Court of Justice confirmed this principle in several early cases, including the case *Fédération Charbonnière de Belgique*, case *Commission v Greece*, case *Musique diffusion française*.<sup>830</sup>

In both the EU and China, the amount of the fine is based on the gravity and the duration of the violation as discussed above. In the EU, the Court of Justice stated the relation between the EU and the national competition law by indicating that ‘*if, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of national justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.*’<sup>831</sup>

In case *Archer Daniels Midland v Commission*<sup>832</sup>, it was questioned whether the punitive damages in the US can be invoked by the undertaking as a defence against the Commission’s fine. The Court of Justice opined that the punitive damages are the result of the proceedings in the US, which aims to compensate the victims, whereas the fine from the Commission intended to impose the punishment.<sup>833</sup> Therefore, ‘*the payment of those damages is insufficiently related to facts of which the Commission should take account*’.<sup>834</sup> Ultimately, the Court of Justice and the Commission confirmed the damages within the EU as a mitigating factor when setting the amount of fine in the case *Pre-insulated Pipe Cartel* and the case *Nintendo*, although without stating the principle of proportionality.<sup>835</sup>

In China, the principle of proportionality is governed by Article 4 Subsection 2 of the Administrative Penalty Law that ‘*setting and imposing the administrative penalty shall be based on facts and shall be in correspondence with the facts, nature and seriousness of the violation of law and damages done to society*’.<sup>836</sup> The application of the Administrative Penalty Law preempts the Provisions of the competition authorities in connection with the fine imposition. Both NDRC and SAIC should consider whether the fine imposed is proportionate to the gravity of the infringement. It is not clear whether paying the damages to the injured person can mitigate part of the ‘*damages done to society*’ and can be invoked by the undertakings and considered by the authorities. It should be noticed that the principle of proportionality can hardly be relied by the infringers thus far in China, which still needs a detailed interpretation of the phrase ‘*damages done to society*’.

## (3) Principle of the *ne bis in idem*

The principle of the *ne bis in idem* can be found in Article 4 of Protocol No 7 ECHR and Article 50 of the Charter in the EU. Both of them underline the right not to be punished twice in criminal proceeding, which refers to the punitive and deterrent effect. As regards the enforcement of the European competition law, it implies that the risk of multiple punishments on the same

<sup>829</sup> Article 49(3) of EU Charter; Article 6 of ECHR

<sup>830</sup> Case 8/55 *Fédération Charbonnière de Belgique* [1955/56] ECR EN p. 292; Case 68/88, *Commission v Greece (Greek maize)* [1989] ECR p. 2965; Joined Cases 100/80 to 103/80, *Musique diffusion française* [1983] ECR 1825, para.121.

<sup>831</sup> Case 14/68, *Wilhelm v Bundeskartellamt* [1969], ECR I-1, para 11

<sup>832</sup> Case T-59/02, *Archer Daniels Msupraland v Commission* [2006] ECR p. II-3627

<sup>833</sup> Case T-59/02, *Archer Daniels Msupraland v Commission* [2006] ECR p. II-3627, para 350-351

<sup>834</sup> Case T-59/02, *Archer Daniels Msupraland v Commission* [2006] ECR p. II-3627, para 351

<sup>835</sup> Case No IV/35.691/E-4 *Pre-Insulated Pipe Cartel*, OJ L 24 of 30 January 1999, p.1, 64; Case No COMP/35.587 PO Video Games. OJ L 255 of 8 October 2003, p. 33, 96 paras 440-441

<sup>836</sup> Article 4 Subsection 2 of Administrative Penalty Law,

infringement resulted from the concurrent competition authorities under Regulation 1/2003, including the Commission and national competition authorities.<sup>837</sup> Likewise, it also implies that the risk of multiple punishments resulted from the competition authorities within and outside the EU.<sup>838</sup> It is evident that the principle of the *ne bis in idem* aims at preventing the multiple punitive effects of concurrent enforcement systems.

As regard the issue of reconciliation of the fine and damages, some believed that the principle of *ne bis in idem* can be applied where the damages also serve as a punitive function. For example, in Section 33(3) sentence 3 of ARC provides that the court determines the damages pursuant to the profits gained by the undertakings. *Mäger and Paul* addressed the punitive elements in the damages governed by Section 33(3) sentence 3 of ARC: (i) this sentence implies that it is possible for the claimant to obtain a disgorgement rather than a loss; (ii) the existing damages are calculated by the difference between the cartel price and the competitive price, which may be punitive in the industry with ‘*high fixed and overhead costs*’ such as computer software.<sup>839</sup>

In China, *ne bis in idem* emerged in Article 24 of the Administrative Penalty Law that ‘*for the same illegal act committed by a party, the party shall not be given an administrative penalty of fine for more than once*’.<sup>840</sup> A common interpretation on the objective of this principle is to avoid the repeated punishment so as to ensure that the punishment fits the crime (proportionality) and protect the parties in the proceeding.<sup>841</sup> The question is whether the fine can be adjusted according to the damages. The damages granted in Article 50 of AML are also compensatory damages. Meanwhile, Article 24 underlines the administrative penalty. Thus far, it could be hard for the defendant to invoke the principle *ne bis in idem* as a defence in a regime with compensatory damages in a private action as found in Germany and China.<sup>842</sup>

### cc) Adjustment of damages

It should be recognized that the adjustment of the amount of damages is impossible in the litigation of the real world, because the ground of the damages is based on the principle of full compensation in both the EU and China. The reduction of compensatory damages should not be allowed by the court; otherwise the right to property is likely to be undermined.<sup>843</sup>

### d. Summary

In sum, in a dual system of public and private enforcement, under-deterrence and the over-deterrence are likely to occur. This part discussed three scenarios in the antitrust enforcement: the sole public enforcement, stand-alone action and follow-on action. According to the discussion above, either the sole public enforcement or the stand-alone action has its limits to

<sup>837</sup> Thorsten Mäger, Thomas B. Paul, *supra* n 818, 93-94; see Walter Frenz, “Ne bis in idem in Kartellrecht“, *EWS* 3/2014, 129; see Renato Nazzini, ‘Fundamental Rights Beyond Legal Positivism: Rethinking the *ne bis in idem* Principle in EU Competition Law’, *Journal of Antitrust Enforcement*, Vol. 2, No. 2 (2014), 271

<sup>838</sup> See Walter Frenz, *supra* n 843, 129; see Renato Nazzini, *supra* n 843, 271

<sup>839</sup> See Thorsten Mäger, Thomas B. Paul, *supra* n 818, 96-97

<sup>840</sup> Article 24 of Administrative Penalty Law

<sup>841</sup> See Legislative Affairs Commission of the NPC Standing Com. (edt.), *The Speak on Administrative Penalty Law of RPC* (中华人民共和国行政处罚法, zhonghua renmin gongheguo xingzheng chufa fa), Law Press 1996, 88; see Xinli Zhu, On the principle of *ne bis in idem* (论一事不再罚原则, lun yishi buzai fa yuanze), *Law Science* 11/2011, 21

<sup>842</sup> See Thorsten Mäger, Thomas B. Paul, *supra* n 818, 97

<sup>843</sup> See Thorsten Mäger, Thomas B. Paul, *supra* n 818, 100-101

produce the sufficiently suitable deterrence, which is resulted from their nature and can barely be overcome. As a comparison, the follow-on action could create the risk of over-deterrence, which lead to the inability to burden by the offenders, or even the risk of bankruptcy. There is a need to establish a mechanism for the reconciliation of the fine and damages so as to prevent the risk of over-deterrence. The adjustment of the fine according to the amount of damages is easier than that of the damages which would not undermine the right to property and the right to sue of the injured persons. Under such circumstance, it is proposed that three possible legal grounds for the adjustment of fine include the priority of the civil liability, the principle of proportionality and the principle of the *ne bis in idem*. Especially under Chinese law, the claimants can firstly invoke the priority of the civil liability within the tortious proceeding so as to ensure their compensation. Of course, the relevant procedures should be established in the antitrust enforcement, so as to ensure their right. Besides, it should be noticed that both the proportionality principle and the *ne bis in idem* in Chinese Law underlined the repeated administrative penalties, which may probably lead to the difficulties for both the infringers and the injured persons to invoke them thus far in China. As regards EU, it is important to observe whether the Commission will continue its sentiment of the precedents and treat the compensation as a mitigating factor.

## Conclusion

The paper has mainly concentrated on the private enforcement and attempted to analyse problems such as the relevant market, proof of dominance and damages, the standing of indirect purchasers, the probative value of the final decision, the relationship between leniency and private action, as well as the reconciliation of the fine and damages. Some conclusions from the discussion of these problems can be summed up below.

First of all, in antitrust action, there are some factors that need to be determined through economic analysis, including the relevant market, dominant position, causation and quantification. From the point of view of the substantial law, there is no large difference between the public and private enforcement in connection with the determination of these issues. One of the difficulties could be that an economic analysis is not an easy job for the trier of fact. Although the review court may have some experience on the competition issue, as to the civil stand-alone action, one may wonder whether the court could overcome these complicated economic issues. Under such circumstances, the roles of the economic expert and competition authorities in antitrust action should be paid the attention to. Furthermore, it is very common that the court would be faced with two or more than two different methods or models in the litigation. We have suggested in this paper that four crucial questions should be examined as a minimum; these include whether the methods adopted by the court are reliable and widely acknowledged; whether the available facts and/or data have been taken into account and that they are consistent with the final decision; whether the decisive factors have been considered; and whether the exceptional cases are likely.

Secondly, allowing indirect purchasers to pursue their damages in antitrust action is at least consistent with the full compensation. Meanwhile, the passing-on defence is imperative so as to avoid over-compensation. The present Article 14(2) of the EU Directive (the rebuttable presumption) provides a desirable picture that lightens the burden of proof on indirect purchasers as well as offers the defendant with the opportunities to rebut the presumption. The very likely possibilities of the overcharge being passed on to the indirect purchasers can largely justify the rebuttable presumption. In addition, summing up the studies on the quantification of the passing-on overcharge, there are several steps that may be helpful for the quantification, including identification of the layer in the distribution chain, rough estimation of the possibility of the passing-on overcharge and precise calculation relying on multiple economic instruments. A rough estimation of the possibility of the overcharge is significant for invoking the passing-on defence and also for an early settlement. The competition authorities can offer some assistance on the precise calculation which has been deemed an insurmountable task by the Illinois Brick rule.

Thirdly, in the dual enforcement system in both the EU and China, discussing the relationship and the conflicts between the public and private enforcement is inevitable, including the probative value of the final decision of the competition authorities, leniency and private action as well as the reconciliation of the fine and damages. As regards the probative value of the final decision, the scope of the probative value should be further declared, especially when there are several ‘*identical*’ agreements in the distribution chain. It is normally suggested that only the operative part of the decision has probative value so that the decision would not be abused to cause legal uncertainty. Furthermore, the probative effect of the commitment should be determined in private action. It is proposed that the commitment should not have the same value with the final infringement decision because firstly the commitment is not the infringement decision that identifies the existence of the infringement. In the second place, both the undertaking that made the commitment and the interested parties including the injured persons should be protected. The probative effect may deter the undertaking from applying the commitment procedure. In the EU, the interested parties have the opportunity to make comments during the market test phase and bring an appeal against the commitment so as to protect their interests. In China, the interested parties can also file an appeal against the commitment decision. But the probative value of the commitment decision could be dangerous for the commitment procedure. Hence, the limitation period is needs to be adjusted. In addition, a strong binding effect could be problematic, especially in China where the public enforcement lacks independence and transparency. There is a risk that the error or bias decision from the public enforcement could be transferred to the private action.

Fourthly, the private action will undoubtedly have an impact on the leniency program that has already been proven as a useful instrument in the public enforcement of both the EU and China. Within the effective leniency program, the certainty and transparency are imperative so that the would-be whistle-blowers could clearly predict the results. The private enforcement seems to be adverse to the certainty and transparency of the leniency. Under such circumstances, the treatment of the corporate statement could be controversial. There are two different positions on this issue that are the absolute protection held by the Commission and the case-by-case examination issued by the Court of Justice. The current EU Directive adopted an absolute protection of the corporate statement, which could be questionable. Firstly, it should be noted that the present Directive limits the joint and several liability of the immunity recipient, which ensures the predictability of the application of the leniency to a certain degree. Under the limits of the joint liability, as considering the demand of the claimant on the evidence and document in the possession of the competition authorities, the case-by-case examination which at least offers the opportunity for vulnerable claimant is more appropriate. The argument that the case-by-case examination would leave the immunity recipient in a less favourable place and would undermine the protection of the commercial secret can hardly be found. Moreover, it should be acknowledged that the case-by-case examination would bring an uncertainty for the leniency, or even resulting in a forum shopping. But such an uncertainty could be limited and forum shopping could be overcome with more detailed rules.

Finally, it is clear that the amount of fine in both the EU and China cannot provide the optimal sanction. There is similar for the amount of damages. But within the dual enforcement system, it can be questioned whether the total sum of the fine plus the damages could create over-deterrence. There is a need to consider the conciliation of the fine and damages. In a follow-on action, an adjustment of the fine is more likely than an adjustment of damages in private action. As regards the adjustment of the fine, there are already several cases in which the competition authorities mitigate the amount of fine according to the facts of compensation. It is questioned whether the compensation could be deemed as a mitigating factor in imposing the fine. The priority of the civil liability when encountering inability to pay, the principle of proportionality and the *ne bis in idem* may be a possible legal ground for it.

## **The way ahead**

Be closely reviewing the EU Directive and the Chinese Judicial Interpretation on AML, the different focal points can be found. The EU Directive focuses mainly on the problems discussed in the literature of the past decades, including the indirect purchaser litigation, the coordination of the public and private enforcement, etc. Furthermore, the Practical Guide on quantifying harm provides useful instructions on the certain and widely acknowledged methods that can be used for quantification. The Chinese policy-maker (the Supreme Court) chose a conservative and obscure attitude regarding the troublesome problems. Although there are a lot of doubts as to the ability of the Chinese court to deal with the complicated antitrust actions, it can be found, according to the experience of last several years, that the private enforcement plays an imperative role in the whole enforcement system. It is explicit that the Judicial Interpretation pays more attention to the stand-alone action rather than the follow-on action, especially regarding the lightened burden of proof of the claimants in proving the infringement. For example, the rules governing the binding effect of the final decision have been removed in the final Judicial Interpretation. Of course, the adjustment on the Limitation period of the follow-on action in Article 16 of the Judicial Interpretation can be deemed leave some room for the follow-on action.

One of the biggest differences between China and the EU is that the EU has a full-fledged public enforcement, which cannot be found in China. The independence and transparency of the Chinese public enforcement is problematic. Of course, in the future, an additional reform of the public enforcement procedure is significant. Thus far, the role of the private enforcement in China especially the stand-alone action could be very important. Meanwhile, some of the solutions to the troublesome problem mentioned above could be different. Taking the probative effect of the final decision as an example, an excessively strong probative value could result in the risk that the error in the public enforcement binds the private action, which is not desirable. Apart from these, considering the severe administrative monopoly, the private action which provide the opportunity for injured persons to file an administrative action against the government is more effective than the public enforcement.

For China, the EU's experience as regards unsolved troublesome problems such as indirect purchaser litigation deserves more studies for the future improvement of the Judicial Interpretation. For the EU, it can be predicted that the national courts of Member States may be faced with large difficulties in determining the infringement. The Chinese experience, especially in the delineation of the relevant market and determination of the dominant position, could be a good example for a comparison.

## Appendix: lists of cases

**Table 8: Lists of part of antitrust cases since 2008 in China**

Year	Case name	Cause of action (the relationship between claimants and defendants)	Claim	Appeal (whether the court of appeal overturned the first instance)	Results	The decision of the court
2008	Li Fangping v. China Netcom(Group) Co., Ltd. Beijing Branch	Abuse of dominant position. (direct purchaser and final consumer)	Modification of the contract; litigation costs	Yes (no)	Unsuccessful (dismissed)	Lack of sufficient evidence on the relevant market
2008	Chongqin West Liquidation Co., Ltd. V. Chongqin Nanping Office of the Chinese Construction Bank	Abuse of dominant position (no document)	No document	No	Settlement outside court and withdrawal	None

2008	Zheng Minjie v. VeriSign Digital Service Technologies (China) Co., Ltd. and the Internet Corporation for Assigned Names and Numbers (ICANN)	Abuse of dominant position (vertical relationship)	Ceasing the behaviour of refusal to deal	No	Unsuccessful (dismissed)	Not fall within the jurisdiction of the Chinese Court
2008	Tangshan Renren Information Services Co., Ltd. v. Beijing Baidu Network Technology Co., Ltd.	Abuse of dominant position (vertical relationship)	Ceasing the behaviour, damages 1,106Mio Yuan	Yes (no)	Unsuccessful (dismissed)	Failed to prove the dominance
2009	Zhou Ze v. China Mobile Group Beijing Co., Ltd. and China Mobile Communications Corporation	Abuse of dominant position Art17 subsec 1 (3) (direct purchaser and final consumer)	Ceasing the abusive behaviour; restitution(1200Yuan); litigation cost	No	Settlement under the justice mediation	None
2009	Beijing Shusheng Electronics Corp. v. Shanghai Shengda Networking Co., Ltd. and Shanghai Xuanting Entertainment Information Technology Co., Ltd.	Abuse of dominant position (competitors)	Declaration of the dominant position of defendants	Yes (No)	Unsuccessful (dismissed)	Incorrectly defined the relevant market and dominant position
2009	Beijing Zhongjing Zongheng Information Consulting Center v. Beijing Baidu Network Technology Co., Ltd.	Abuse of dominant position (vertical relationship)	Determining the abuse of dominant position by defendant; ceasing the abusive behaviour; damages(500,000Yuan)	Yes	No record	No record
2009	Huzhou Yiting Termite Prevention Services Co., Ltd. v. Institute of Termite	Abuse of dominant position,	Damages	Yes (No)	Unsuccessful (dis	Incorrectly defined the abusive behaviour

	Prevention Co., Ltd. of Huzhou City	Art17 subsec 1 (4) (new entrant)			miss ed)	
2009	Liu Dahua v. Dongfeng Nissan Passenger Vehicle Company	Abuse of dominant position, Art17 subsec1(1)(3)(direct purchaser and final consumer)	Ceasing the abusive behaviour; damages (260Yuan);	Yes (No)	Unsuccessful (dismissed)	Incorrectly defined the relevant market
2011	Huawei InterDigital Technology Corporation and Others v. Others	Abuse of dominant position, direct purchaser	Ceasing the abusive behaviour; damages 20million Yuan; litigation costs and reasonable costs	Yes (No)	Partially successful (affirmed most of claims filed by Huawei including damages)	Affirmed the definition of the relevant market and dominant position by claimant Huawei
2012	Shenzhen Huiexun v. Shenzhen Pest Control Association	Horizontal agreement, cartel by trade association and the non-cartel competitor	invalidity of the agreement; damages 1Yuan and litigation cost	Yes (no)	Unsuccessful	Non-monopoly agreement
2012	Dai Haibo v. China Telecom Chongqin Branch and Others	Vertical agreement, direct purchaser	Ceasing the abusive behaviour; damages 9800Yuan+180Yuan and litigationcost	No	Unsuccessful	Failed to provide sufficient evidence on the dominance of the defendant

2013	Xiaoqin WU v. Shaanxi Radio	Vertical agreement bundling, direct purchaser	Declaration of the valid behaviour; restitution 15Yuan and litigation cost	Yes (yes)	Win in first instance; unsuccessful in second instance	No bundling
2013	Xu Liang v. Qindao Tongbao Auto	Vertical agreement, bundling, direct purchaser	Removing the unreasonable transaction conditions; litigation cost	No	Unsuccessful	Failed to prove the dominance of defendant
2013	Feng Yongmin v. Fujian Provincial Expressway Company Ltd	Abuse of dominant position, direct purchaser	Declaration of the illegality of the behaviour and the validity of the charter; damages 5650Yuan and litigation cost	Yes (no)	Unsuccessful	No abuse of dominance
2013	Beijing Ruibang Yonghe Science and Technology Trade Company ('Rainbow') v. Johnson & Johnson	Vertical agreement, direct purchaser	Termination of the agreement; damages 14.399 Mio Yuan and litigation cost	Yes (yes)	Partly won; damages awarded 530,000Yuan	
2013	Qihoo v. Tencent	Abuse of Dominant position	Ceasing the infringing conduct; damages for 0.15Billion Yuan; litigation cost; apology	Yes (no)	Unsuccessful	
2014	Lou Binglin v. Beijing Aquatic Wholesale Association	Horizontal agreement, cartel by trade association and the non-cartel competitor	Voidness and termination of the agreement; damages 772 512Yuan	Yes (no)	Partial won	

**The cases of the public enforcement (2008-2015)** <sup>844</sup>

**Table 9: cases decided by SAIC**

Date	Case Name	Provisions relied	Fine (percentage of turnover)	disgorgem ent	C ommi tment or lenie ncy
2015.1.9	Dongfang Water transportation	17, 47	593208.06 (2%)	38521.48	
2015.1.12	Shankai Sports International	19(2)	None	None	com mitm ent
2014.9.5	Shangyu City Concrete and Cement (9 associations association involved)	13(3),16, 46(3)	400,000Yuan(1 association); 250,000Yuan(4 associations); 150,000Yuan(2 associations); 10,000(2 associations)	None	
2014.4.28	Chongqing Gas	17Subsec1(5), 47	1,793,588.55Y uan(1%)	None	
2014.9.29	Xuzhou Tobacco	17Subsec1(6), 47	1723745.04Yu an(1%)	None	
2014.8.18	Chongqing Wuxi city quarries	13Subsec1(3), 46(1)	200,000Yuan; 90,000Yuan; 70,000Yuan; 40,000Yuan	None	
2014.7.4	Inner Mongolia Tobacco	17Subsec1(5), 47	5,957,000Yuan (1%)	None	
2014.5.27	Inner Mongolia Fireworks and Crackers(6 undertakings involved)	13Subsec1(3), 46	154k, 141.8k, 128.1k, 74.4k, 63k, 22.4k(4 undertakings fined by 8%; 2 by7%)	None	
2013.12.16	Huizhou Yiyuan Purified Water Company Limited	17(5),47	2,363,597.45Y uan (2%)	860,236.0 9Yuan	
2013.4.7	Xishuangbanna Association of Travel Service and	16,46(3)	400,000Yuan; 400,000Yuan	None	

<sup>844</sup> The data is collected from the released decision by the two authorities in their website, which could be not complete. The Chinese version can be found here: <http://jjs.ndrc.gov.cn/fjgld/> (Price supervision and inspection and anti-Monopoly Bureau of NDRC) and <http://www.saic.gov.cn/zwgk/gggs/jzzf/> (Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC)

	Tourism Association				
2013.3.6	Sichuan Yibin Bricks & Tiles Industrial Association(1 association and 5 undertakings)	13Subsec1(2), 46(1)(3)	500,000Yuan(a ssociation); 170,000Yuan; 120,000Yuan; 110,000Yuan; 100,000Yuan; 60,000Yuan	None	
2013.3.14	Zhejiang Cixi City Construction Engineering Test Industry Association	13Subsec1(3),	None	None	C ommitment
2012.12.14	Zhejiang Jiangshan City Concrete and Cement Undertakings	13Subsec1(3), 46(1)	471,600Yuan; 258,450Yuan; 453,150Yuan	None	
2012.12.3	Hunan Chenzhou City Insurance Association	13Subsec1(3), 16, 46(3)	450,000Yuan	None	
2012.11.30	Hunan Changde City Insurance Association	13Subsec1(3), 16, 46(3)	400,000Yuan	None	
2012.12.3	Hunan Zhangjiajie City Insurance Association	13Subsec1(3), 16, 46(3)	418,100Yuan	None	
2012.11.30	Hunan Yongzhou City Insurance Association( 1 association and 10 undertakings involved)	13Subsec1(3), 16, 46(1)(3)	400,000Yuan(a ssociation); 418.1k; 190.1k; 118.9k; 99.1k; 84.1k; 23.9k; 23.4k; 14.4k; 1.8k; 9k(1%, 10 undertakings)	None	
2013.8.13	Liaoning Building Materials Industry Association (1 association and 13 undertakings)	13Subsec1(2); 16; 46(1)(3)	100,000Yuan(a ssociation); 2,540k; 2,010k; 1,950k; 1,700k; 1,670k; 1,200k; 1,170k; 1,020k; 1,010k;(No record, 9 undertakings); 500k(No record, 4 undertakings)	None	
2012.1.4	Henan Anyang City Used Vehicle	13Subsec1(3); 46(1)	23504.9Yuan;	130522.68 Yuan;	

			18829.96Yuan;	139978.87 Yuan;	
			15672.18Yuan;	143136.65 Yuan;	
			23504.92Yuan;	135303.91 Yuan;	
			37992.83Yuan;	120816Yuan;	
			23504.92Yuan;	131091.69 Yuan;	
			20262.65Yuan;	138546.18 Yuan;	
			23857.5Yuan;	134951.33 Yuan;	
			28311.66Yuan;	130497.17 Yuan;	
			30038.78Yuan;	123988.82 Yuan;	
			19440.05Yuan(No record, 11 undertakings)	139368.78 Yuan	
2011.4.1	Jiangsu Taihe City LPG	13Subsec1(3), 46(1)	130,230Yuan(No record)	205,537Yuan	
2010.8.31	Lianyungang City Building Materials and Building Machinery Industry Association	13Subsec1(3); 16; 46(1)(3)	200,000Yuan (association);		
			78248.34Yuan;	26896.08 Yuan;	
			97933.87Yuan;	24247.83 Yuan;	
			46226.95Yuan;	18993.83 Yuan;	
			185260.54Yuan;	30357.91 Yuan;	
			123052.49Yuan (No record, undertakings)	35985.56 Yuan	

SAIC <http://www.saic.gov.cn/zwgk/gggs/jzzf/>  
Case number 21

**Table 10: cases decided by NDRC**

Date	Case Name	Provisions relied	Fine (percentage of turnover)	disgorgement	Commitment or Leniency
2015.2.9	Qualcomm Incorporated	17Subsec1(1)(5), 47, 49	6088million Yuan (8%)	None	
2014.8.15(auto parts price fixing)	NTN Corporation;	13Subsec1(1); 46(1)	119.16million Yuan (6%);	None	Leniency(40% reduction);
	NSK Ltd;	13Subsec1(1); 46(1)	174.92Million Yuan (4%);	None	(60% reduction);

cartel case)	Nachi;	13Subsec1(1); 46(1)	Immunity;	None	(Immunity);
	Sumitomo Electric;	13Subsec1(1); 46(1)	290.4Million Yuan (6%);	None	(40% reduction);
	Furukawa Electric Co., Ltd.;		34.56Million Yuan (6%);		(40% reduction);
	Yazaki;		241.08Million Yuan (6%);		(40% reduction);
	Mitsuba;		40.72Million Yuan (8%);		(20% reduction);
	Mitsubishi Electric Corporation;		44.88Million Yuan(8%);		(20% reduction);
	Aisan Industry Co., Ltd.;		29.79Million Yuan(8%);		(20% reduction);
	Denso Corporation;		150.56Million Yuan(4%);		(60% reduction);
	Hitachi Automotive Service;		Immunity;		(Immunity);
	JTEKT Corporation		109.36Million Yuan(8%)		(20% reduction)
2013.12.30 (Zhejiang Insurance price fixing cartel)	PICCP&C Zhejiang Branch;	13Subsec1(1); 46(1)	Immunity;		Leniency (Immunity);
	Minan Property and Casualty Insurance Co. Ltd. Zhejiang Branch;		1.37Million Yuan(1%);		None
	BOC Insurance Zhejiang Branch;		628,300 Yuan(1%);		None
	Anbang Insurance Zhejiang Branch;		4,080,000Yuan (1%);		
	Chang AN Property and Liability Insurance Ltd., Zhejiang Branch;		2,760,000 Yuan(1%);		
	Tianan Property Insurance, Zhejiang Branch;		6,700,000Yuan (1%);		

	Ancheng Insurance, Zhejiang Branch;		2,450,000Yuan(1%);		
	Anxin Agricultural Insurance Co. Ltd., Zhejiang Branch;		347,000Yuan(1%);		
	Bohai Property Insurance, Zhejiang Branch;		382,500 Yuan(1%);		
	China Continent Property & Casualty Insurance Company Ltd., Zhejiang Branch;		9.55Million Yuan(1%)		
	Taiping General Insurance Co. Ltd., Zhejiang Branch;		3Million Yuan(1%);		
	Huatai P&C Insurance, Zhejiang Branch;		1.90Million Yuan(1%);		
	Sinosafe Insurance, Zhejiang Branch;		2.06Million Yuan(1%);		
	Dubon Insurance, Zhejiang Branch;		2.37Million Yuan(1%);		
	Dazhong Insurance Company Ltd., Zhejiang Branch;		5.05Million Yuan(1%);		
	Alltrust Insurance, Zhejiang Branch;		2.43Million Yuan(1%);		
	Yong An Insurance, Zhejiang Branch;		4.04Million Yuan(1%);		
	Sunshine Insurance, Zhejiang Branch;		9.6Million Yuan(1%);		

	Tianping Aoto Insurance Company Ltd., Zhejiang Branch;		2.87Million Yuan(1%);		
	China Insurance, Zhejiang Branch;		10.29Million Yuan(1%);		
	CPIC, Zhejiang, Branch;		20.7Million Yuan(1%);		
	Ping An Insurance, Zhejiang Branch;		15.994Million Yuan(1%);		Leniency (45% reduction)
	China Life, Zhejiang Branch;		1.127Million Yuan(1%);		Leniency (90% reduction)
	Zhejiang Insurance Association		500,000Yuan		
2013.1(LC D price cartel)	Samsung;	Articles 14 Subsec1, 40 and 41 of Price Law (the duration of cartel is from 2001 to 2006)	101Million	36.73Million	Leniency involved (without detailed information )
	LG;		108Million		
	CMO;		94.41Million;		
	AUO;		21.89Million;		
	Chunghwa Picture Tubes;		16.2Million;		
	Hannstar		240,000		
2011.11	Shandong Weifang Medicine;		6.5Million Yuan(no record);	377,000Yuan;	
	Weifang Xinhua Medicine trade Ltd.		100,000Yuan( no record)	52,600Yuan	
2011.3	Unilever price cartel		2Million		
2011.1 (price fixing cartel)	Zhejiang Fuyang City Paper Manufacturing industry association		500,000Yuan(association)		
2010	Rice Noodle price fixing cartel		100,000Yuan( 2 undertakings); 30,000-		Leniency (Immunity, no further record)

			80,000Yuan; immunity;		
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## Appendix: Chinese Law

### Anti-Monopoly Law of China<sup>845</sup>

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 Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 30, 2007, is hereby promulgated and shall go into effect as of August 1, 2008.

Hu Jintao

President of the People's Republic of China

August 30, 2007

Anti-monopoly Law of the People's Republic of China

(Adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress on August 30, 2007)

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Chapter I

General Provisions

<sup>845</sup> The original version can be found in Chinese national congress:  
[http://www.npc.gov.cn/englishnpc/Law/Integrated\\_index.html](http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html)

Article 1 This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy.

Article 2 This Law is applicable to monopolistic conducts in economic activities within the territory of the People's Republic of China; and it is applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China.

Article 3 For the purposes of this Law, monopolistic conducts include:

- (1) monopoly agreements reached between undertakings ;
- (2) abuse of dominant market position by undertakings; and
- (3) concentration of undertakings that lead, or may lead to elimination or restriction of competition.

Article 4 The State shall formulate and implement competition rules which are compatible with the socialist market economy, in order to improve macro-economic regulation and build up a sound market network which operates in an integrated, open, competitive and orderly manner.

Article 5 Undertakings may, through fair competition and voluntary association, get themselves concentrated according to law, to expand the scale of their business operations and enhance their competitiveness on the market.

Article 6 Undertakings holding a dominant position on the market may not abuse such position to eliminate or restrict competition.

Article 7 With respect to the industries which are under the control of by the State-owned economic sector and have a bearing on the lifeline of the national economy or national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries, and shall, in accordance with law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect the consumers' interests and facilitate technological advance.

The undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, and subject themselves to public supervision, and they shall not harm the consumers' interests by taking advantage of their position of control or their monopolistic production and sale of certain commodities.

Article 8 Administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or restrict competition.

Article 9 The State Council shall establish an anti-monopoly commission to be in charge of organizing, coordinating and guiding anti-monopoly work and to perform the following duties:

- (1) studying and drafting policies on competition;
- (2) organizing investigation and assessment of competition on the market as a whole and publishing assessment reports;

- (3) formulating and releasing anti-monopoly guidelines;
- (4) coordinating administrative enforcement of the Anti-Monopoly Law; and
- (5) other duties as prescribed by the State Council.

The composition of and procedural rules for the anti-monopoly commission shall be specified by the State Council.

Article 10 The authorities responsible for enforcement of the Anti-monopoly Law specified by the State Council (hereinafter referred to, in general, as the authority for enforcement of the Anti-monopoly Law under the State Council) shall be in charge of such enforcement in accordance with the provisions of this Law.

The authority for enforcement of the Anti-monopoly Law under the State Council may, in light of the need of work, empower the appropriate departments of the people's governments of provinces, autonomous regions or municipalities directly under the Central Government to take charge of relevant enforcement of the Anti-monopoly Law in accordance with the provisions of this Law.

Article 11 Trade associations shall tighten their self-discipline, give guidance to the undertakings in their respective trades in lawful competition, and maintain the market order in competition.

Article 12 For the purposes of this Law, undertakings include natural persons, legal persons, and other organizations that engage in manufacturing, or selling commodities or providing services.

For the purposes of this Law, a relevant market consists of the range of the commodities for which, and the regions where, undertakings compete each other during a given period of time for specific commodities or services (hereinafter referred to, in general, as "commodities").

## Chapter II

### Monopoly Agreements

Article 13 Competing undertakings are prohibited from concluding the following monopoly agreements:

- (1) on fixing or changing commodity prices;
- (2) on restricting the amount of commodities manufactured or marketed;
- (3) on splitting the sales market or the purchasing market for raw and semi-finished materials;
- (4) on restricting the purchase of new technologies or equipment, or the development of new technologies or products;
- (5) on joint boycotting of transactions; and
- (6) other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

For the purposes of this Law, monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition.

Article 14 Undertakings are prohibited from concluding the following monopoly agreements with their trading counterparts:

- (1) on fixing the prices of commodities resold to a third party;
- (2) on restricting the lowest prices for commodities resold to a third party; and
- (3) other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

Article 15 The provisions of Article 13 and 14 of this Law shall not be applicable to the agreements between undertakings which they can prove to be concluded for one of the following purposes:

- (1) improving technologies, or engaging in research and development of new products; or
- (2) improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production;
- (3) increasing the efficiency and competitiveness of small and medium-sized undertakings;
- (4) serving public interests in energy conservation, environmental protection and disaster relief;
- (5) mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression;
- (6) safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or
- (7) other purposes as prescribed by law or the State Council.

In the cases as specified in Subparagraphs (1) through (5) of the preceding paragraph, where the provisions of Articles 13 and 14 of this Law are not applicable, the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable the consumers to share the benefits derived therefrom.

Article 16 Trade associations may not make arrangements for undertakings within their respective trades to engage in the monopolistic practices prohibited by the provisions of this Chapter.

### Chapter III

#### Abuse of Dominant Market Position

Article 17 Undertakings holding dominant market positions are prohibited from doing the following by abusing their dominant market positions:

- (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- (2) without justifiable reasons, selling commodities at prices below cost;
- (3) without justifiable reasons, refusing to enter into transactions with their trading counterparts;
- (4) without justifiable reasons, allowing their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them;

- (5) without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions;
- (6) without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing; or
- (7) other acts of abuse of dominant market positions confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

For the purposes of this Law, dominant market position means a market position held by undertakings that are capable of controlling the prices or quantities of commodities or other transaction terms in a relevant market, or preventing or exerting an influence on the access of other undertakings to the market.

Article 18 The dominant market position of an undertaking shall be determined on the basis of the following factors:

- (1) its share on a relevant market and the competitiveness on the market;
- (2) its ability to control the sales market or the purchasing market for raw and semi-finished materials;
- (3) its financial strength and technical conditions;
- (4) the extent to which other business managers depend on it in transactions;
- (5) the difficulty that other undertakings find in entering a relevant market; and
- (6) other factors related to the determination of the dominant market position held by an undertaking.

Article 19 The conclusion that an undertaking holds a dominant market position may be deduced from any one of the following circumstances:

- (1) the market share of one undertaking accounts for half of the total in a relevant market;
- (2) the joint market share of two undertakings accounts for two-thirds of the total, in a relevant market; or
- (3) the joint market share of three undertakings accounts for three-fourths of the total in a relevant market.

Under the circumstance specified in Subparagraph (2) or (3) of the preceding paragraph, if the market share of one of the undertakings is less than one-tenths of the total, the undertakings shall not be considered to have a dominant market position.

Where an undertaking that is considered to hold a dominant market position has evidence to the contrary, he shall not be considered to hold a dominant market position.

## Chapter IV

### Concentration of Undertakings

Article 20 Concentration of undertakings means the following:

- (1) merger of undertakings;

(2) control over other undertakings gained by an undertaking through acquiring their shares or assets; and

(3) control over other undertakings or the ability capable of exerting a decisive influence on the same gained by an undertaking through signing contracts or other means.

Article 21 When their intended concentration reaches the threshold level as set by the State Council, undertakings shall declare in advance to the authority for enforcement of the Anti-monopoly Law under the State Council; they shall not implement the concentration in the absence of such declaration.

Article 22 In any of the following circumstances, undertakings may dispense with declaration to the authority for enforcement of the Anti-monopoly Law under the State Council:

(1) one of the undertakings involved in the concentration owns 50 percent or more of the voting shares or assets of each of the other undertakings; or

(2) one and the same undertaking not involved in the concentration owns 50 percent or more of the voting shares or assets of each of the undertakings involved in the concentration.

Article 23 To declare concentration to the authority for enforcement of the Anti-monopoly Law under the State Council, the undertakings shall submit the following documents and materials:

(1) declaration in writing;

(2) explanation of the impact to be exerted by the concentration on competition in a relevant market;

(3) concentration agreement;

(4) the financial report of each of the undertakings in the previous fiscal year, which is audited by a certified public accountant firm; and

(5) other documents and materials as specified by the authority for enforcement of the Anti-monopoly Law under the State Council.

In the written declaration shall clearly be stated the titles of the undertakings involved in the concentration, their domiciles, business scopes, the anticipated date for concentration and other matters specified by the authority for enforcement of the Anti-monopoly Law under the State Council.

Article 24 In case documents or materials submitted by the undertakings are incomplete, the undertakings concerned shall supplement the relevant documents or materials within the time limit prescribed by the authority for enforcement of the Anti-monopoly Law under the State Council. If they fail to do so at the expiration of the time limit, they shall be deemed to have made no declaration.

Article 25 The authority for enforcement of the Anti-monopoly Law under the State Council shall, within 30 days from the date it receives the documents or materials submitted by the undertakings which conform to the provisions of Article 23 of this Law, make a preliminary review of the concentration declared by the businesses and make a decision whether to conduct a further review, and notify the undertakings of its decision in writing. Before the authority for enforcement of the Anti-monopoly Law under the State Council makes such decision, the undertakings shall not implement concentration.

Where the authority for enforcement of the Anti-monopoly Law under the State Council decides not to conduct further review or fails to make such a decision at the expiration of the specified time limit, the undertakings may implement concentration.

Article 26 Where the authority for enforcement of the Anti-monopoly Law under the State Council decides to conduct further review, it shall, within 90 days from the date of decision, complete such review, decide whether to prohibit the undertakings from concentrating, and notify them of such decision in writing. Where a decision on prohibiting the undertakings from concentrating is made, the reasons for such decision shall be given. The undertakings shall not implement concentration during the period of review.

Under any of the following circumstances, the authority for enforcement of the Anti-monopoly Law under the State Council may extend the period for review as specified in the preceding paragraph on condition that it notifies the undertakings of the extension in writing, however, the extension shall not exceed the maximum of 60 days:

- (1) The undertakings agree to the extension;
- (2) The documents or materials submitted by undertakings are inaccurate and therefore need further verification; or
- (3) major changes have take place after the undertakings made the declaration.

Where the authority for enforcement of the Anti-monopoly Law under the State Council fails to make a decision at the expiration of the time limit, the undertakings may implement concentration.

Article 27 The following factors shall be taken into consideration in the review of concentration of undertakings:

- (1) the market shares of the undertakings involved in concentration in a relevant market and their power of control over the market;
- (2) the degree of concentration in relevant market;
- (3) the impact of their concentration on assess to the market and technological advance;
- (4) the impact of their concentration on consumers and the other relevant undertakings concerned;
- (5) the impact of their concentration on the development of the national economy; and
- (6) other factors which the authority for enforcement of the Anti-monopoly Law under the State Council deems to need consideration in terms of its impact on market competition.

Article 28 If the concentration of undertakings leads, or may lead, to elimination or restriction of competition, the authority for enforcement of the Anti-monopoly Law under the State Council shall make a decision to prohibit their concentration. However, if the undertakings concerned can prove that the advantages of such concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest, the authority for enforcement of the Anti-monopoly Law under the State Council may decide not to prohibit their concentration.

Article 29 Where the authority for enforcement of the Anti-monopoly Law under the State Council does not prohibit the concentration of undertakings, it may decide to impose

additional, restrictive conditions for lessening the negative impact exerted by such concentration on competition.

Article 30 The authority for enforcement of the Anti-monopoly Law under the State Council shall, in a timely manner, publish its decisions on prohibition against the concentration of undertakings or its decisions on imposing additional restrictive conditions on the implementation of such concentration.

Article 31 Where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security as is required by the relevant State regulations, in addition to the review on the concentration of undertakings in accordance with the provisions of this Law.

## Chapter V

### Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to require, or require in disguised form, units or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them.

Article 33 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to impede the free flow of commodities between different regions by any of the following means:

- (1) setting discriminatory charging items, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities;
- (2) imposing technical specifications or test standards on non-local commodities, which are different from those on local commodities of similar types, or taking discriminatory technical measures, such as repeated test and repeated certification, against non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;
- (3) adopting a special practice of administrative licensing for non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;
- (4) erecting barriers or adopting other means to prevent non-local commodities from coming in or local commodities from going out; or
- (5) other means designed to impede the free flow of commodities between regions.

Article 34 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from participating, or restrict their participation, in local invitation and tendering by imposing discriminatory qualification requirements or assessment standards, or by refusing to publish information according to law.

Article 35 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from making investment or restrict their investment locally or exclude them from establishing branch offices locally or restrict their establishment of such offices, by treating them unequally as compared with the local undertakings, or by other means.

Article 36 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to compel undertakings to engage in monopolistic conducts that are prohibited by this Law.

Article 37 Administrative organs may not abuse their administrative power to formulate regulations with the contents of eliminating or restricting competition.

## Chapter VI

### Investigation into Suspected Monopolistic Conducts

Article 38 The authority for enforcement of the Anti-monopoly Law shall investigate any suspected monopolistic conduct according to law.

All units and individuals shall have the right to report to the authority for enforcement of the Anti-monopoly Law against suspected monopolistic conducts. The latter shall keep the information confidential.

If the report is made in writing and relevant facts and evidence are provided, the authority for enforcement of the Anti-monopoly Law shall conduct necessary investigation.

Article 39 When conducting investigations into a suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law may take the following measures:

- (1) conducting inspection of the business places or the relevant premises of the undertakings under investigation;
- (2) making inquiries of the undertakings under investigation, the interested parties, or other units or individuals involved, and requesting them to provide relevant explanations;
- (3) consulting and duplicating the relevant documents and materials of the undertakings under investigation, the interested parties and other relevant units and individuals, such as bills, certificates, agreements, account books, business correspondence and electronic data;
- (4) sealing up or seizing relevant evidence; and
- (5) inquiring about the bank accounts of the undertakings under investigation.

For taking the measures specified in the preceding paragraph, a written report shall be submitted for approval to the principal leading person of the authority for enforcement of the Anti-monopoly Law.

Article 40 For the authority for enforcement of the Anti-monopoly Law to conduct investigation into suspected monopolistic conducts, there shall be at least two law-enforcement officers, who shall produce their law enforcement papers.

The law-enforcement officers shall make written records when conducting inquiry and investigation, which shall be signed by the persons after being inquired or investigated.

Article 41 The authority for enforcement of the Anti-monopoly Law and its staff members are obligated to keep confidential the commercial secrets they come to have access to in the course of law enforcement.

Article 42 The undertakings under investigation, the interested parties or other relevant units or individuals shall cooperate with the authority for enforcement of the Anti-monopoly Law

in performing their duties in accordance with law, and they shall not refuse to submit to or hinder the investigation conducted by the authority for enforcement of the Anti-monopoly Law.

Article 43 The undertakings under investigation and the interested parties shall have the right to make statements. The authority for enforcement of the Anti-monopoly Law shall verify the facts, justifications and evidence presented by the said undertakings or interested parties.

Article 44 Where after investigation into and verification of the suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law concludes that it constitutes a monopolistic conduct, the said authority shall make a decision on how to deal with it in accordance with law and may make the matter known to the public.

Article 45 With respect to the suspected monopolistic conduct which is under investigation by the authority for enforcement of the Anti-monopoly Law, if the undertakings under investigation commits themselves to adopt specific measures to eliminate the consequences of its conduct within a certain period of time which is accepted by the said authority, the authority for enforcement of the Anti-monopoly Law may decide to suspend the investigation. In the decision shall clearly be stated the details of the undertakings' commitments.

Where the authority for enforcement of the Anti-monopoly Law decides to suspend investigation, it shall oversee the fulfillment of the commitments made by the undertaking. Where the undertaking fulfills its commitments, the authority for enforcement of the Anti-monopoly Law may decide to terminate the investigation.

In any of the following circumstances, the authority for enforcement of the Anti-monopoly Law shall resume investigation:

- (1) The undertakings concerned fail to fulfill its commitments;
- (2) Material changes have taken place in respect of the facts on which the decision to suspend investigation was based; or
- (3) The decision to suspend investigation was based on incomplete or untrue information provided by the undertaking concerned.

## Chapter VII

### Legal Liabilities

Article 46 Where an undertaking, in violation of the provisions of this Law, concludes and implements a monopoly agreement, the authority for enforcement of the Anti-monopoly Law shall instruct it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined not more than RMB 500,000 yuan.

If the business manage, on its own initiative, reports to the authority for enforcement of the Anti-monopoly Law about the monopoly agreement reached, and provides material evidence, the said authority may, at its discretion, mitigate, or exempt the undertaking from, punishment.

Where a trade association, in violation of the provisions of this Law, has arranged the undertaking in the trade to reach a monopoly agreement, the authority for enforcement of the Anti-monopoly Law may impose on it a fine of not more than 500,000 yuan. If the circumstances are serious, the administrative department for the registration of public organizations may cancel the registration of the trade association in accordance with law.

Article 47 Where an undertaking, in violation of the provisions of this Law, abuses its dominant market position, the authority for enforcement of the Anti-monopoly Law shall instruct it to discontinue such violation, confiscate its unlawful gains and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year.

Article 48 Where the undertakings, in violation of the provisions of this Law, implement concentration, the authority for enforcement of the Anti-monopoly Law under the State Council shall instruct them to discontinue such concentration, and within a specified time limit to dispose of their shares or assets, transfer the business and adopt other necessary measures to return to the state prior to the concentration, and it may impose on them a fine of not more than 500,000 yuan.

Article 49 To determine the specific amount of fines prescribed in Articles 46, 47 and 48, the authority for enforcement of the Anti-monopoly Law shall consider such factors as the nature, extent and duration of the violations.

Article 50 Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.

Article 51 Where an administrative department or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher level for handling the matter according to law.

Where otherwise provided for by laws or administrative regulations in respect of administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs that abuse their administrative power to eliminate or restrict competition, such provisions shall prevail.

Article 52 Where, during the review and investigation conducted by the authority for enforcement of the Anti-monopoly Law, a unit or individual refuses to provide relevant materials or information, or provides false materials or information, or conceals, or destroys, or transfers evidence, or refuses to submit to or obstructs investigation in any other manner, the authority for enforcement of the Anti-monopoly Law shall instruct it/him to rectify, and a fine of not more than 20,000 yuan shall be imposed on the individual and not more than 200,000 yuan on the unit; if the circumstances are serious, a fine of not less than 20,000 yuan but not more than 100,000 yuan shall be imposed on the individual and not less than 200,000 yuan but not more than one million yuan on the unit; and if a crime is constituted, criminal liability shall be investigated for in accordance with law.

Article 53 Where an undertaking is dissatisfied with the decision made by the authority for enforcement of the Anti-monopoly Law in accordance with the provisions of Article 28 or 29 of this Law, it may first apply for administrative reconsideration according to law; and if it is dissatisfied with the decision made after administrative reconsideration, it may bring an administrative action before the court according to law.

Where an undertaking is dissatisfied with any decision made by the authority for enforcement of the Anti-monopoly Law other than the decisions specified in the preceding paragraph, it may apply for administrative reconsideration or bring an administrative action before the court according to law.

Article 54 Where a staff member of the authority for enforcement of the Anti-monopoly Law abuses his power, neglects his duty, engages in malpractices for personal gain, or divulges commercial secrets he comes to have access to in the course of law enforcement, which constitutes a crime, he shall be investigated for criminal liability according to law; and if his case is not serious enough to constitute a crime, he shall be given an administrative sanction according to law.

## Chapter VIII

### Supplementary Provisions

Article 55 This law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights.

Article 56 This Law is not applicable to the association or cooperation by agricultural producers or rural economic organizations in their business activities of production, processing, sale, transportation, storage of farm products, etc.

Article 57 This Law shall go into effect as of August 1, 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 1539<sup>th</sup> meeting of the Judicial Committee of the Supreme People's Court on January 30, 2012 is hereby announced. (Judicial Interpretation on AML)**

Effective June 1, 2012

[Unofficial Translation Courtesy of Baker & McKenzie LLP]<sup>846</sup>

Dated May 3, 2012

Judicial Interpretation [2012] No.5

### **Rules 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 Contract 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

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<sup>846</sup> The Translation can be found in: Adrian Ewch, David Stallibrass ed., China's Anti-Monopoly Law: The First Five Years,

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.

### **The Law against Unfair Competition (1993)**

**Article 6** A public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchasing commodities from the business operators designated by him, thereby precluding other business operators from fair competition.

**Article 7** Governments and their subordinate departments shall not abuse administrative powers to restrict people to purchasing commodities from the business operators designated by them and impose limitations on the rightful operation activities of other business operators.

Governments and their subordinate departments shall not abuse administrative powers to restrict commodities originated in other places from entering the local markets or the local commodities from flowing into markets of other places.

**Article 11** A business operator shall not, for the purpose of pushing out their competitors, sell their commodities at prices lower than costs.

Any of the following shall not be deemed as an unfair competition act:

- (1) selling perishables or live commodities;
- (2) disposing of commodities near expiration of their validity duration or those kept too long in stock;
- (3) seasonal sales; or
- (4) selling commodities at a reduced price for the purpose of clearing off debts, change of business or suspension of operation.

**Article 12** A business operator may not, against the will of purchasers, conduct tie-in sale of commodities or attach any other unreasonable conditions to the sale of their commodities.

**Article 15** Bidders shall not act in collusion with each other so as to force up or down the bidding prices.

Bidders and tender-invited shall not collude with each other so as to push out their competitors from fair competition.

### **The Pricing Law (1998)**

**Article 14** The manager may not commit any of the following illegitimate acts in pricing:

- (1) colluding with others to manipulate the market price, thus harming the lawful rights and interests of other managers or consumers;
- (2) besides disposing of perishable, seasonal and overstocked commodities at reduced prices according to law, dumping commodities at prices lower than production cost in order to drive out rivals or monopolize the market, thus disrupting normal production and operational order and impairing the interests of the State or the lawful rights and interests of other managers;
- (3) fabricating and spreading information about price hikes and forcing up prices, thus stimulating excessive commodity price hikes;
- (4) using false or misleading prices to deceive consumers or other managers into transacting a deal with him;
- (5) while providing the same commodities or services, employing price discrimination against other managers with equal transaction conditions;
- (6) forcing up or forcing down prices in disguised form by raising or lowering grades when purchasing or selling commodities or providing services;
- (7) making exorbitant profits in violation of the provisions of laws and regulations; or
- (8) other illegitimate acts in pricing prohibited by laws and administrative rules and regulations.

### **The Tendering and Bidding Law (2000)**

**Article 50** If a procuratorial agency, in violation of the provisions of this Law, divulges confidential information and materials related to the tender and bid activity or colludes with a tender or bidder to prejudice the State's interests, the social and public interests or the legitimate rights and interests of other persons, the agency shall be imposed a fine exceeding 50,000 yuan and not exceeding 250,000 yuan and the person-in-charge directly responsible and other persons directly responsible of the agency shall be imposed a fine exceeding 5 per cent and not exceeding 10 per cent of the fine imposed on the agency; the illegal gains therefrom, if any, shall be confiscated of; if the circumstance is serious, its qualifications for procuratorial agency shall be suspended or revoked; and if a crime is constituted, criminal responsibility shall be demanded for according to law.

If any loss is caused to other persons, the agency shall be liable therefor according to law.

If an act set forth in the preceding paragraph affects the bidding result, the result shall be void and invalid.

**Article 51** A tenderer who restricts or excludes an intended bidder with unreasonable requirements, applies discriminate treatment to an intended bidder, compels bidders to form a consortium to jointly submit their bids, or restricts competition among the bidders, shall be ordered to make corrections and may be imposed a fine exceeding 10,000 yuan and not exceeding 50,000 yuan.

## **Civil Procedure Law (CPL)**

**Article 52** When one party or both parties consist of two or more than two 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.

If a party of two or more persons to a joint action have common rights and obligations with respect to the object of action and the act of any one of them is recognized by the others of the party, such an act shall be valid for all the rest of the party; if a party of two or more persons have no common rights and obligations with respect to the object of action, the act of any one of them shall not be valid for the rest.

**Article 53** If the persons comprising a party to a joint action is large in number, the party may elect representatives from among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent. However, modification or waiver of claims or admission of the claims of the other party or pursuing a compromise with the other party by the representatives shall be subject to the consent of the party they represent.

**Article 55** *The organ authorized by the law and the related organization can rely on the conducts that harm the public interest, such as environment pollution, infringement of the mass consumer interest, to bring an action before the court.*

**Article 63** Evidence shall be classified as follows:

- (1) documentary evidence;
- (2) material evidence;
- (3) audio-visual material;
- (4) testimony of witnesses;
- (5) statements of the parties;
- (6) expert conclusions; and
- (7) records of inspection.

The above-mentioned evidence must be verified before it can be taken as a basis for ascertaining a fact.

**Article 64** It is the duty of a party to an action to provide evidence in support of his allegations.

If, for objective reasons, a party and his agent ad litem are unable to collect the evidence by themselves or if the people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it.

The people's court shall, in accordance with the procedure prescribed by the law, examine and verify evidence comprehensively and objectively.

## **Judicial Interpretation on Evidence**

**Article 1** The claimant filed a claim or the defendant propose a counterclaim before court, which should satisfy the evidence standard in filing an action'. Article 2 provides that 'the

parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted. Where any party cannot produce evidence or the evidences produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavourable consequences.

**Article 9** The facts as mentioned below need not be proved by the parties concerned by presenting evidences:

1. The facts that are known by all people;
2. Natural laws and theorems;
3. The fact that can be induced according to legal provisions or known facts or the rule of experience of daily life;
4. The facts affirmed in the judgment of the People's court that has taken effect;
5. The facts affirmed in the award of the arbitration organ that has taken effect;
6. The facts that have been proved in the valid notary documents.

The facts as mentioned in items 1, 3, 4, 5, 6 of the preceding paragraph shall be excluded if they can be overthrown by contrary evidences of the parties concerned.

**Articles 15** The “evidences deemed as necessary by the People's court for hearing the case” as mentioned in Article 64 of the Civil Procedure Law of the People's Republic of China shall refer to the following:

1. The facts that may injure the interest of the state, the public interest of the society or the lawful interest of other people;
2. The procedural matters that have nothing to do with the substantial dispute, such as adding parties concerned, suspending the litigation, ending the litigation, withdrawing, etc on the basis of authority of the courts.

**Article 16** Unless provided in Article 15 of the present Provisions, the investigation upon and collection of evidences by the People's court shall be based on the application of the parties concerned.

**Article 17** In any of the following circumstances, the parties concerned and the agent ad litem thereof may plead the People's court to investigate upon and collect evidences:

1. The evidences applied for investigation and collection are the archive files kept by relevant organs of the state and must be accessed by the People's court upon authority;
2. The materials that concern state secrets, commercial secrets or personal privacy;
3. Other materials that cannot be collected by the parties concerned or the agents ad litem thereof due to objective reasons.

**Article 18** To plead the People's court for investigating upon and collecting evidences, the parties concerned and the agents ad litem thereof shall submit a written application.

The application shall clearly specify the basic information of the evidences, such as the name of the person investigated or the title of the entity, the dwelling place, the contents of the

evidences to be investigated upon and collected, the reasons of why the evidences need to be investigated upon and collected by the People's court and the facts to be proved.

**Article 19** The application of the parties concerned and the agents ad litem thereof to the People's court for investigating upon and collecting evidences shall be filed at no later than seven days prior to the expiration of the term for producing evidences.

If the People's court refuses to approve the application of the parties concerned or the agents ad litem thereof, it shall service a notice to them. The parties concerned and the agents ad litem thereof may file a written application to the People's court that accepts the application for reconsideration within three days after receiving the notice. The People's court shall give a reply within five days after receiving the application for reconsideration.

**Article 20** The written evidences to be investigated upon and collected by the investigators may be the original document or the reproduction or photocopy thereof which has been verified as correct. In the case of a reproduction or a photocopy, the sources and the collection of evidences shall be specified in the investigation notes.

**Article 21** The physical evidences investigated upon and collected by the investigators shall be the original things. If it is indeed difficult for the person investigated to provide the original thing, he may provide a reproduction or a photo thereof. In the case of a reproduction or a photo, the investigation notes shall specify how the evidence is obtained.

**Article 22** The investigators who investigate upon and collect computer data or audio-visual materials such as sound recordings and visual recordings, etc. shall request the person investigated to provide the original carrier of the relevant data. If it is difficult to provide the original carrier, a reproduction may be provided. In the case of a reproduction, the investigators shall specify the source of the evidences and the process of its making in the investigation notes.

### **Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China**

**No. 28** The "place of a tortious act" as prescribed in Article 29 of the Civil Procedure Law includes the place where the tort is committed and the place where the tortious consequence takes place.

### **Consumer Protection Law**

Article 47 China Consumer's Association and the consumer associations in province, autonomy region or municipalities can bring the action before People's Court against the behavior infringing mass consumers.

### **Regulation of the People's Republic of China on the Disclosure of Government Information (政府信息公开)**

**Article 9** An administrative organ shall voluntarily disclose the government information satisfying any of the following basic requirements:

- (1) Information concerning the vital interests of citizens, legal persons or other organizations;
- (2) Information that should be widely known by the general public or concerns the participation of the general public;
- (3) Information reflecting the structural establishment, duties, procedures for handling affairs and other situation of the administrative organ;
- (4) Other information that shall be voluntarily disclosed by the administrative organ as prescribed by laws, regulations and the relevant state provisions.

**Article 14 subsection 4** The administrative bodies shall not disclosure the government information referred to state secret, business secret or individual privacy, unless with the contest of the interested parties, or administrative bodies can discover the information if they opined that the public interest would be undermined without the disclosure.

**Article 23** If administrative bodies opined the applied information referred to business secret or individual privacy and the disclosure would impair the interest of the third party, they shall seek for the contest of the third parties; if the third parties do not agree, the information shall not be discovered. But if the administrative bodies opined that the non-disclosure decision would impose a significant influence on the public interest, they shall discover it (proactively) and inform the third parties with the disclosure decision and the reason of it.

#### **General Principle of the Civil Law**

**Article 106** Citizens and legal persons who breach a contract or fail to fulfil other obligations shall bear civil liability.

Citizens and legal persons who through their fault encroach upon State or collective property or the property or person of other people shall bear civil liability.

Civil liability shall still be borne even in the absence of fault, if the law so stipulates.

**Article 134** the forms of civil liabilities include: cessation of infringement, removal of obstacles, elimination of dangers, return of property, restoration of original condition, repair, reworking or replacement, compensation for loss, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation and apology.;

#### **The Tort Law**

**Article 15** The methods of assuming tort liabilities shall include:

1. cessation of infringement;
2. removal of obstruction;
3. elimination of danger;
4. return of property;
5. restoration to the original status;
6. compensation for losses;
7. apology; and
8. elimination of consequences and restoration of reputation.

The above methods of assuming the tort liability may be adopted individually or jointly.

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