Addressing Legitimacy Concerns in Antitrust Private Litigation involving China's State-Owned Enterprises

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China's Anti-Monopoly Act (AML) incorporated key antitrust provisions inspired by EU antitrust concepts into China's law in 2007. By analysing leading post-2007 antitrust cases heard before China's courts taken by private parties challenging State-Owned Enterprises (SOEs) anti-competitive activities, the authors argue that China's Judiciary has not accepted antitrust Legitimacy, despite the AML's enactment. Leading antitrust cases challenging SOEs anti-competitive activities, taken by either consumers or enterprises are analysed, highlighting the contrast with how EU antitrust jurisprudence deals with similar matters. The analysis illustrates how China's courts have applied key antitrust concepts (such as abuse of dominant position, prohibition of market-sharing; price-fixing; etc.) in a questionable manner. Given that the understanding of such concepts are accepted in over 125 jurisdictions, this raises major questions about the Legitimacy and Effectiveness of antitrust principles in the legal system of the world's most dynamic economy.

That there is an antitrust Legitimacy and Effectiveness problem to be addressed has been recently partially recognised by the State in China, with the putting forward of reform proposals by its antitrust regulator (the State Administration of Markets Regulator (SAMR)) in 2020 in an effort to get major State agencies to recognise the primacy of antitrust. However, these reform proposals omitted reference to the Judiciary's role in antitrust enforcement against SOEs, even though they play a large role in the economy. The article demonstrates how the reform proposals, which appeared in October 2021 in the AML Amendment Bill 2021, will not solve the private antitrust enforcement Legitimacy problems identified by the authors in cases involving SOEs. Several suggestions to overcome judicial deference to SOEs' overly robust anti-competitive practices are proposed by the authors, including soft measures that in the long run may be more effective than legislative change. The article also discusses the need for the AML to incorporate a single economic entity test and a collective dominance test in order to give the courts dealing with allegations of SOE anti-competitive behaviour a more comprehensive conceptual toolbox to assist the courts

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make findings of dominance. Without movement also on the judicial side, the authors conclude that the Legitimacy of antitrust principles will continue to be in question inside China's legal framework, and consequently the Effectiveness of private antitrust remedies will continue to be weak in one of the world's largest economies.

Keywords: Anti-Monopoly Act 2007; Competition Law; China; Abuse of Dominance; Price-Fixing; SAMR; SOEs; private antitrust enforcement; Court of Justice; Anti-Monopoly Amendment Bill.

1. INTRODUCTION

The enactment of China's modern antitrust law, the *Anti-Monopoly Act* (AML)[1], introduced European style antitrust ideas[2] into China for the first time in 2007. However, despite the AML containing such familiar forms of antitrust prohibitions[3], such as prohibiting the abuse of dominance, prohibition of price-fixing, etc., the application of such prohibitions have been repeatedly sidelined in private antitrust actions taken in China's courts against State-Owned enterprises (SOEs[4]) since the AML came into force in 2008. This judicial approach raises major questions about the Legitimacy and Effectiveness[5] of antitrust ideals in China's legal system, which were introduced into China as part of China's WTO accession obligations.[6] Although *public enforcement* of the AML by State antitrust agencies against SOEs has been relatively active[7], by contrast the response of the judiciary in *private antitrust actions* initiated by private individuals or enterprises against SOEs has been tepid by comparison.[8]

Cases heard since the AML came into force in 2008 reveal that the judiciary has given a cool response to the application of European-style antitrust prohibitions incorporated in the

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1. The AML was adopted in 2007 and came into force on 1 August 2008.

2. Such as those set out in The Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326 (hereinafter TFEU), in particular Arts 101 & 102 prohibiting price-fixing or market sharing cartels and abuse of dominant position in the European Union (the corresponding articles in the AML being Arts. 13-19). The AML also adopted key features of the European Union Merger Control regime (the corresponding articles in the AML being Arts. 20-31). Similar antitrust prohibitions can be found, to one degree or another in US equivalents, the Clayton Act 1914 and the Sherman Act 1890. *See* 中华人民共和国反垄断法 [The Anti-Monopoly Law of the People's Republic of China] 2007 (hereinafter AML).

3. OECD, 'OECD Competition Trends 2020' (2020) 3 observes that, to date, more than 125 jurisdictions around the world prohibit typical anti-competitive infringements, such as abuse of dominance, price-fixing, market sharing, etc.

4. SOEs are enterprises owned and controlled by the government. Although private investors can be invited to take limited shareholdings in SOEs since 2013, control remains with the State.

5. The concepts of Effectiveness and Legitimacy as they apply in the context of antitrust enforcement will be elaborated in detail below in Section 2.

6. Xiaoye Wang, 'China's Accession to the WTO and the Drafting of the Antimonopoly Law in China' (2003) 49 Chinese J.L. 9; Selene Ko, 'An Introduction to Chinese Legislation' (2004) 3 Washington U. Global Stud. L. R. 267.

7. 41% of public enforcement investigations are taken against SOEs: see further below (n 69) and accompanying text.

8. Of 700 private antitrust cases taken between 2008-2019, all cases have been unsuccessful, apart from 3 cases against SOEs taken by private individuals (see further Section 4.2 below). There have been 3 other successful cases, but in those cases, the defendants were not SOEs: 2 were taken against foreign enterprises by private domestic enterprises, and 1 against an industry association. See further below (n 11; n 40).

AML (e.g., prohibition of abuse of dominance; the prohibition of market-sharing; prohibition of price-fixing; etc.). This reluctant judicial practice to implement antitrust principles in private antitrust actions taken against SOEs raises major questions about the Legitimacy and the Effectiveness of the *AML* itself.

This concern is exacerbated by 2020 State proposals to reform the AML, put forward by the State Administration for Market Regulation (SAMR) in 2020[9], which in 2021 have appeared in the form of a Bill which is expected to be enacted into law in 2022.[10] Because these proposals do not address the courts' approach to private antitrust enforcement, they fail to deal with the largely unsuccessful attempts by private actors to enforce antitrust norms in China's courts against SOEs[11], massive State controlled economic players who not only dominate much of the economy, but many of whom also compete internationally on a global scale.[12]

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[9]. SAMR,《反垄断法》修订草案(公开征求意见稿)》[Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China] (2 Jan 2020) (hereinafter SAMR Draft on the Amendment of the AML) was issued by way of a public announcement of 2 Jan 2020 to amend the AML.

[10]. A bill titled "Amendments to Anti-Monopoly Law of China" was released to the public for consultation on 23 Oct 2021.

[11]. According to the People's Supreme Court (www.court.gov.cn/zixun-xiangqing-130571.html) there have been around 700 private antitrust cases instituted in China since 2008. However, what is not known is precisely how many of these 700 cases have involved SOEs as defendants. Full information is not available. However, we can get some general idea by piecing together partial sources of such information from authoritative sources. For example, according to the People's Supreme Court website (https://wenshu.court.gov.cn: "China Judgment Online" website, accessed 21 Nov 2021) over 700 private antitrust cases have been instituted in China since 2008 against defendants of various types, and while they are not all categorized by category of defendant or plaintiff, and only 95 of them are available on the website for the years 2011-2020, what we are told is that of these 95 judgments, 15 were cases against SOE-defendants, which include the only 3 successful cases taken against SOEs by private individuals (i.e., consumers) (*Shaanxi TV* and two *Yongfu Water* cases, which are considered in Section 4.2.2). It is regrettable that more of the 700 cases are not readily accessible. As recently as 2018, other researchers, for example, Shi Jianzhong, Dai Long and Jiao Haitao (eds), *反垄断诉讼典型案件分析与解读 (2008-2018)* [*Analysis and Interpretation of Landmark Antitrust Cases (2008-2018)*] (CUPL Press 2018) 138, which stated that private antitrust cases were accessible for the period 2008-2018, of which 35 cases were identified as being against SOE-defendants; Lifang and Partners (*see* www.lifanglaw.com/plus/view.php?aid=1873), Law Firm in March 2020 identified 8 private antitrust cases taken against SOEs in 2019: 5 had consumer plaintiffs and 3 had private enterprise plaintiffs. So once the partial overlap between the 2011-2020 and 2008-2018 lists are accounted for, this means about approximately 50 cases (against SOEs) have been identified thus far, all of which have failed except the aforementioned 3 consumer plaintiff cases noted above. We conclude that there are therefore probably more than 50 SOE defendant cases, but not all are accessible.

[12]. China's SOEs are now engaged in projects around the world, e.g., China State Grid (overseas investments USD $23.2 billion, ranked 3rd, Fortune Global 500, 2020); China State Construction Engineering (operating in over 100 countries and territories, ranked 18th, Fortune Global 500, 2020); Industrial & Commercial Bank of China (covering 21 countries and regions along the "Belt and Road" initiative, China's economic expansion plan around the world, ranked 24th, Fortune Global 500, 2020); China Railway Engineering Group (currently operating in more than 90 countries and territories, ranked 50th, Fortune Global 500, 2020). Many such SOEs are advancing around the world via China's Belt and Road initiative, investing in over 65 countries around the

At the time of its enactment, the AML was seen as China's equivalent to the European Union's antitrust prohibition regime, echoing significant elements seen in European Union antitrust norms[13], along with elements adapted for local domestic conditions.[14] However, now some 13 years of AML case law handed down since the AML came into force, begs the question of whether the primacy[15] the AML's antitrust prohibitions were intended to have, have actually been accepted by China's judiciary. This primacy problem has not only been identified by scholars[16] but also by SAMR, though admittedly SAMR has only raised this primacy issue[17] in the (albeit important) context of wanting the State's industrial policies (and the State agencies who develop such policies) to be *competition-neutral*[18], but SAMR has not included the Judiciary's role in antitrust enforcement in this context.[19] This question,

world. *See* 'Global 500' (*Fortune*, 2020) <https://fortune.com/global500/>.

[13]. The AML contains prohibitions (in AML Arts 13-15, 17-19) which are broadly similar to those found in TFEU Arts 101 & 102. Many elements in the AML are based on European Union antitrust ideals: e.g., the TFEU Art 101 prohibition of anti-competitive agreements, e.g., market sharing or price fixing; the Art 102 prohibition of abuse of a dominant position, prohibiting practices by dominant players designed to destroy market competition; the restraint of mergers that bring about excessive market concentration, requiring prior notification of large mergers for regulatory approval: Giacomo Di Federico, 'The New Anti-Monopoly Law in China from a European Perspective' (2009) 32 World Competition 249; H. Stephen Harris, 'The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China' (2006) 7 Chicago J. Int'l L. 169.

[14]. Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar 2014) 100 points out that the AML is "a catalyst for the reform of China's political system".

[15]. These concerns about AML implementation and respect for the AML have also been the subject of State attention, as per SAMR's proposals for AML reform in 2020, which, *inter alia*, proposed that it be made explicit that the AML has primacy over industrial policy. SAMR (formed in May 2018) is a high level State agency responsible for a wide range of areas such as food security and medicines security amongst others, as well as being the chief antitrust policy-maker, supervisory and regulatory authority for the enforcement of antitrust law in China. It ranks just below the (top Government level) State Council of China, and is responsible for supervising the 'National Anti-Monopoly Agency' which was formed in 2018 with the merging of (1) the 'Anti-Monopoly Bureau', which was formerly supervised by the Ministry of Commerce (MOFCOM); (2) the 'Price Supervision and Anti-Monopoly Bureau', which was formerly supervised by the National Development and Reform Commission (NDRC); and (3) the 'Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau', which was formerly supervised by the State Administration for Industry & Commerce (SAIC).

[16]. After over a decade of implementation, issues relating to the AML's effectiveness emerged. For further discussion of this issue, see, for example, Xiaoye Wang, 'Retrospective and Prospects of China's Anti-Monopoly Law' in Steven Van Uytsel, Shuya Hayashi and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar 2020) 226-30; Wan Jing, '反垄断诉讼尚需破除诸多瓶颈' [Anti-Monopoly Lawsuit Still Needs to Eliminate Several Bottlenecks] *Legal Daily, China* (Beijing, 5 Jan 2015) 6.

[17]. AML Reform Proposals advanced by SAMR in 2020 to address the primacy issue will be analyzed below in Section 3.3 to see if they will be adequate to address the problem. While the 2020 proposals can be criticized because they did not subject industrial policies of high-level State agencies to Fair Competition Review. SAMR addressed this question in its 2021 *Fair Competition Review Implementation Guidance*, by providing that all industrial policies of *all levels* of State agencies should be subject to Fair Competition Review.

[18]. This primacy question between antitrust law and industrial policy becomes especially acute in the context of private antitrust enforcement actions taken in the courts against SOEs who benefit from State industrial policy.

[19]. *See* below Section 4.

whether the judiciary has accepted the Legitimacy of AML, becomes especially acute in the context of private antitrust actions taken in the courts against SOEs[20] who benefit from State industrial policy, dominating many sectors of the China economy, with many being significant global players in international markets outside of China as well.[21]

To demonstrate how the approach taken by the Judiciary in such cases negates the *Effectiveness and Legitimacy* of the AML in China's legal system[22], examination shall be undertaken in Section 4 below of the 3 (only) successful private antitrust enforcement cases against SOEs. Though few in number, they are revealing as to the judicial understanding of the AML. These successful cases are set among approximately 700[23] *unsuccessful* private antitrust enforcement cases heard to date between 2008 and 2019 against defendants of all types, whether public or private. They demonstrate that, even in successful cases, the generally unsympathetic approach taken by the Judiciary towards AML remedies[24],

[20]. i.e., for the purposes of this article, we focus on cases taken by private litigants (consumers and private enterprises) in private antitrust court proceedings taken against SOEs: we shall not focus on public enforcement because that is well covered elsewhere, see, for example, Jingyuan Ma, 'The Enforcement of Competition Law – A Behavioral Law and Economic Perspective' in *Competition Law in China: A Law and Economic Perspective* (Springer 2020) 153-79; Zhisong Deng, 'Public Enforcement of Antitrust Law in China: Perspective of Procedural Fairness' in Frederic Jenny and Yannis Katsoulacos (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (2016) 135-48; nor do we focus on private enforcement against private enterprises (which has yielded no successful cases to date apart from two successful judgments against foreign enterprises operating in China: see n 40). This is mainly because (a) courts either misunderstand how to properly apply antitrust principles or are unwilling to do so; and (b) legal costs are high (which can lead to plaintiffs withdrawing lawsuits), see, for example, Li Guohai, 'Review of Distribution of Evidential Burden in China's Civil Action Against Monopoly: Taking Typical Cases as the Research Sample' (2019) 41 J. Jishou U. (Social Sciences) 12; Ma (n 20) 184. Instead we focus our attention on private antitrust enforcement attempts against SOEs (the most important question in the AML Legitimacy and Effectiveness context) because the SOEs dominate much of the economy, many operate internationally, and they are obliged to comply with the AML's antitrust prohibitions, yet inexplicably SAMR's 2020 reform proposals (while very concerned that State industrial policy should not breach competition-neutrality) has ignored the performance of the Judiciary in enforcing the AML's antitrust norms against economically powerful SOEs in China, hence the question of whether the Judiciary has accepted antitrust Effectiveness and Legitimacy in this context is the focus of the article.

[21]. e.g., China Unicom, China Telecom and China Mobile dominate the telecoms; PetroChina, Sinopec and CNOOC dominate the oil sector. Not only do they dominate the domestic economic landscape, but many of China's larger SOEs also are significant players internationally: e.g., Air China, China Railway, COSCO (ports), etc.

[22]. And in turn, such practice raises a wider question as to whether toleration of such judicial practice gives China's SOEs a significant "home" advantage when they go on to compete against their international competitors, both in China's domestic market, and also with competitors beyond China who themselves have to obey antitrust regimes in their "home" markets, e.g., enterprises operating in the European Union must comply with European Union antitrust (as well as national antitrust) laws in the Member States out of which they operate.

[23]. She Ying, '反垄断法制化水平不断提高' [Antitrust Enforcement Keeps Improving], *Economic Daily, China* (17 Nov 2018).

[24]. Indeed, in private antitrust cases not involving SOEs as defendants (but rather other private enterprises for example) the court is similarly unsympathetic, *see* Section 4 where leading cases taken by private enterprises

contributes towards the view that judicial respect for antitrust adherence, well established in western economies[25], is not currently regarded as a top judicial priority in China.[26]

This analysis of key "successful" judgments in private antitrust enforcement cases against SOEs will reveal that the courts in China frequently defer to the interests of SOEs when AML breaches by SOEs are alleged to have occurred.[27] We shall see how the cases analysed demonstrate unquestionably anti-competitive activity (e.g., abuse of dominance) by SOEs[28], yet the judgments delivered demonstrate that the courts in China do not regard the AML's antitrust ideals as a Legitimate and important set of legal principles that SOE's have to adhere to in their market behaviour, and so, the courts' support for granting effective remedies is diminished. This suspicion that China's judicial system has not accepted its responsibility to give Effectiveness and Legitimacy to the AML's antitrust prohibitions in the context of private antitrust actions taken against SOEs, is confirmed by wider comparison with private antitrust cases in general, against *all types* of defendant, over the same period (2008-2019), which shows the success rate in private antitrust cases to be incredibly low in general.[29]

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against non-SOE defendants, rejected by the courts, are included in the analysis.

[25]. For example, TFEU Art 106 prohibits SOEs in the European Union from engaging in anti-competitive activities. Since the late 1980's, the European Commission has made adverse findings against EU Member States on many occasions finding that national legal regimes contravened Art 106 (former Art 90 RC) by allowing State-appointed monopolies or holders of State-conferred special or exclusive rights to engage in anti-competitive activity: e.g., Decision 2002/344/EC *Snelpd/France, La Poste* OJ [2002] L.120/19. Similarly, the Court of Justice of the European Union has delivered major judgments pursuant to Art 106, upholding Commission Decisions findings of Art 106 infringements by Member States: see for example, Case C-157/94 *Commission v Netherlands* ECLI:EU:C:1997:499; Case C-202/88 *France v Commission* ECLI:EU:C:1991:120, *etc.*; or when assisting EU Member States' national courts to achieve a common understanding of key elements of Art 106 when hearing Art 106 cases before national courts where plaintiffs allege that State appointed monopolists or holders of State-conferred special or exclusive rights had acted anti-competitively: e.g., Case C-320/91 *Corbeau* ECLI:EU:C:1993:198; Case C-260/89 *ERT v DEP* ECLI:EU:C:1991:254; Case C-242/95 *GT Link A/S Danske Statsbanen* ECLI:EU:C:1997:376; Case C-340/99 *TNT Traco SpA v. Poste Italiane SpA* ECLI:EU:C:2001:281, etc..

[26]. This deference to the interests of SOEs is seen also in public antitrust enforcement, which though outside the scope of this article, has also traditionally treated SOEs somewhat leniently in SOE antitrust violations, though to be fair, public enforcement against SOEs has generally been far more active in terms of outcomes and number compared to private enforcement efforts (which have largely failed): 41% of AML public enforcement efforts taken by SAMR or it predecessor agencies have been against SOEs, with a significant number resulting in imposition of fines: *see further* below (n 69).

[27]. These 3 cases are considered below in Section 4.2.2

[28]. See Section 4 below.

[29]. Xue Yi and others, '反垄断执法机构近五年执法情况浅析' [Analysis of Anti-Monopoly Law Enforcement by Anti-Monopoly Enforcement Agencies in the Past Five Years] Zhonglun Law Firm (10 Mar 2020) <www.zhonglun.com/Content/2020/03-10/1721341809.html> (an examination of private antitrust enforcement shows that over 700 private antitrust enforcement cases were initiated in the courts over the period 2008-2019, however, amongst these cases, the success rate has been incredibly low – less than 1%).

Examination of the cases analyzed by the Authors will reveal that the AML lacks these two key qualities, Effectiveness and Legitimacy, *in the eyes of the judiciary*. It would appear that China's judicial system has not accepted its responsibility to give Effectiveness and Legitimacy to the AML's antitrust prohibitions in the private antitrust enforcement context, and so the consequent case law in China constitutes an obstacle to the Legitimacy of antitrust prohibitions, similar to those we find in European antitrust law, being accepted as norms in China.

2. EFFECTIVENESS and LEGITIMACY

Before considering the historical position and the case law, first we shall define what Effectiveness and Legitimacy could mean in the AML / SOE context.

2.1 Effectiveness

Effectiveness[30] in the context of consumers or enterprises attempting to enforce the AML against SOEs can be examined on several levels. For example, Effectiveness in a credible antitrust system could mean that one should expect to observe courts applying the AML's anti-competitive prohibitions against SOEs (who are expressly stated to be subject to the AML[31]), with courts making AML infringement findings against SOEs where appropriate, and

[30]. *Effectiveness* in the context of enforcing the AML against SOEs can be defined from several perspectives. For example, whether the courts will grant effective remedies against SOEs (who are clearly subject to the jurisdiction of the AML) so that all market players can be challenged (including SOEs) on a level playing field), such as for example, in cases where it clear that (for example) the SOE has abused its dominant position contrary to AML Arts 7(2) (which requires SOEs to obey the AML) and Art 17 (which prohibits SOEs from abusing their dominant position): *see e.g.*, Žygimantas Juška, 'The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement' (2017) 62 The Antitrust Bulletin 603; Daniel A. Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 Vand L. R. 675 pointing out that Effectiveness of private antitrust enforcement can also be considered by reference to compensation sufficiency and ensuring deterrence). This shall be considered further in Section 4.2.2 below.

[31]. AML, Art 7(2) provides: "[industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or industries] shall operate lawfully, be honest and faithful, be strictly self-disciplined, accept social supervision, and shall not damage the interests of consumers by virtue of their dominant or exclusive positions." While admittedly Art 7(1) does provide SOEs with an exemption from AML application in cases where national economic security is involved, the authors point our that *has not* been a feature of any of the judgments considered in this article (Art 7(1)) provides: "With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein […]". Further, Art 31 provides: "Where a foreign investor merges and acquires a domestic enterprise or participates in concentration by other means, if national security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provision."

granting effective remedies to those who suffer from antitrust violations. Effectiveness in this context could also be exhibited by whether court awards provide "full" compensation, say, in the European Union sense (defined to include *actual losses, loss of profits, interests and costs for litigation*) to cover the injured party's losses, or whether compensation is merely tokenistic. Effectiveness can also be demonstrated by examining whether court awards include legal costs as well. Effectiveness by way of deterrence could be examined by examining whether the courts actively entertain litigation, and whether awarded damages were higher than actual losses.[32] Our research in this article will demonstrate how major questions arise about the Effectiveness of antitrust prohibitions when the case law is examined against the forgoing definitions of antitrust Effectiveness. [33]

2.2 Legitimacy

Legitimacy[34] in the context of enforcing the AML against SOEs means that in a credible antitrust system one should expect courts to apply the law as it stands, rather than not applying it, which could be seen tantamount to ignoring express statutory prohibitions. What the cases about to be considered will reveal is that when consumers or private

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However, neither of these two latter provisions has been argued or featured in the SOE antitrust cases considered in this article.

[32]. *See further* on the Effectiveness of competition / antitrust legislation from various different perspectives: Ma (n 20) 227; Urszula Jaremba and Laura Lalikova, 'Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland' (2018) 9 J. European Comp. L. & P. 226; Bineswaree Bolaky, 'The Effectiveness of Competition Law in Promoting Economic Development' (2013) 5 Int'l J. Econ. & Fin. Studies 33; Franz Kronthaler, 'Effectiveness of Competition Law: A Panel Data Analysis' (Halle Institute for Economic Research, 2007).

[33]. *See further* in Section 4.2.2.

[34]. For the purposes of this article, *Legitimacy* of private antitrust enforcement shall be considered from the perspective of legal rules and how they are, or are not, implemented by the courts (e.g., legal rules pertaining to compensation or the application of the definition of market dominance). Legitimacy concerns shall also be exhibited by examining cases that clearly demonstrate that the courts either do not understand antitrust principles, or are unwilling to apply them, even in situations where they are obviously applicable: Robert H. Lande and Joshua P. Davis, 'Restoring the Legitimacy of Private Antitrust Enforcement' in *A Report to the 45th President of the United States* (American Antitrust Institute's Transition Report on Competition Policy 2017) Ch 6. Just as with Effectiveness, Legitimacy of private antitrust enforcement could be considered from many perspectives, for example from the perspective of "output legitimacy" (e.g., "how many cases have been taken"; or "measure the impact of competition enforcement by looking at the welfare effects of antitrust enforcement", or "the prevalence and size of fines for infringement"): Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' (2014) European University Institute Working Paper Law 2014/01, 6-8. More generally, Legitimacy can also looked at from the perspective of economic activities in the face of arbitrary State interference in the economy: William E. Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chi-Kent L. R. 265.

enterprises attempt to enforce the AML against SOEs in China's courts[35], the courts repeatedly do not give full force to the enforcement and application of the AML, giving rise to the conclusion that the AML is not regarded by the courts as a fundamental set of norms which *SOE* market actors must adhere to, because they are expressly subject[36] to the AML's antitrust prohibitions.

As our research will demonstrate, the question of Legitimacy is an acute one, when considered against the background concern that has been raised by the State itself, via SAMR's 2020 reform proposals. SAMR has raised the concern that the State (and its industrial policies) need to observe competition-neutrality when industrial policies are being formulated and implemented.[37] Without such neutrality, there will always be deference towards State policies to the detriment of enforcement of antitrust legislation and principles.

3. COMPETITION-NEUTRALITY in CHINA

3.1 Some Statistics

To set the context for the examination of the historical position of competition-neutrality in China, some statistics surrounding private antitrust cases are instructive. Of around a total of 700 private antitrust enforcement cases taken in China's courts between 2008-2019[38], taken against various categories of defendants (including SOEs, business or industry associations, and private enterprises), only 3 such cases have been successful against SOEs.[39] Each of these 3 successful cases against SOEs was taken by a private individual as

[35]. There have been only 3 successful private antitrust cases since the AML came into force in 2008, all against SOE defendants: (1) Judgment no.98 in 2016 handed down by the Supreme People's Court of China in *Wu Xiaoqin v Shaanxi Radio and Television Network Media (Group) Co, Ltd* [*吴小秦诉陕西广电网络传媒（集团）股份有限公司捆绑交易纠纷再审案*] (hereafter *Wu Xiaoqin v Shaanxi TV*); (2) Judgment no.1190 in 2018 handed down by the Guangxi Autonomous Region Higher People's Court in *Wu Zongqu v Yongfu Water* [*吴宗区诉永福县供水公司滥用市场支配地位纠纷案*]; (3) Judgment no.1191 in 2018 handed down by the Guangxi Autonomous Region Higher People's Court in *Wu Zongli v Yongfu Water* [*吴宗礼诉永福县供水公司滥用市场支配地位纠纷案*]. All shall be considered below in Section 4.2.2.

[36]. AML, Art 7.

[37]. See further in Section 3.3 below.

[38]. Xue and others (n 29).

[39]. *See* (n 8; n 11).

plaintiff. None taken by private enterprises, as plaintiffs, were successful against SOEs.[40] At least 50 of the 700 cases have involved SOEs as defendants, but the true figure is probably significantly higher but it has not been possible for the authors to find all such judgments because only certain judgments are published.[41] Therefore, apart from the tiny number of successful cases, the remaining vast majority of AML private enforcement cases have all been rejected on grounds where the conclusions drawn by the courts lead us to conclude that the Legitimacy of the AML is seriously under question in the minds of the Judiciary. Leading examples will be considered in Section 4 below.

3.2 The Historical Position on the Lack of Competition Neutrality

The question of the acceptance of competition neutrality and antitrust primacy arises in China because the People's Republic of China (founded in 1949) has a long history of State direction in the marketplace, where advancement of industrial policies traditionally has

[40]. Nor indeed were private antitrust enforcement actions successful against any other category of defendant either, apart from two cases which were successful *against foreign enterprises* operating in China (*see* cases 1 & 2 below); and two cases which were successful against domestic private enterprises (*see* cases 3 & 4 below), and a case taken against business association (*see* case 5 below): (1) Case 1 Judgment no.6 handed down by the Shanghai High People's Court of China in 2012 in *Beijing Rui Bang Yong He Science and Trade Co., Ltd. v Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd.* [北京锐邦涌和科贸有限公司诉强生(上海)医疗器材有限公司、强生(中国)医疗器材有限公司纵向垄断协议纠纷上诉案] (hereinafter *Rui Bang v Johnson & Johnson*); Case 2 Judgment no.306 handed down by the Guangdong High People's Court of China in 2013 in *Huawei Technologies Co Ltd v InterDigital Technology Corporation, InterDigital Communications, LLC and InterDigital Corporation* [华为技术有限公司诉交互数字技术公司、交互数字通信有限公司、交互数字公司滥用市场支配地位纠纷上诉案] (hereinafter *Huawei v IDC*); Case 3 Judgment no.867 handed down by the Ningbo Intermediate People's Court of China in 2018 in *Healthcare Co., Ltd. v Fujian Fuhua Industry&Trade Co.,Ltd., Cangzhou Dahua Co., Ltd., Yantai Juli Fine Chemical Co., Ltd. and Gansu Yinguang Juyin Chemical Co., Ltd.* [梦百合家居科技股份有限公司起诉国内四家 TDI 生产商(福化工贸股份有限公司、沧州大化股份有限公司、烟台巨力精细化工股份有限公司和甘肃银光聚银化工有限公司)垄断协议案] (hereinafter *Healthcare Co., Ltd. v TDI*); Case 4 Judgment no.1271 handed down by the Nanjing Intermediate People's Court of China in 2019 in *Yangtze River Pharmaceutical Group Guangzhou Hairui Pharmaceutical Co., Ltd., Yangzijiang Pharmaceutical Group Co., Ltd. v Hefei Medical Co., Ltd., Hefei Enruit Pharmaceutical Co., Ltd. and Nanjing Haichen Pharmaceutical Co., Ltd.* [扬子江药业集团广州海瑞药业有限公司、扬子江药业集团有限公司与合肥医工医药股份有限公司、合肥恩瑞特药业有限公司、南京海辰药业股份有限公司垄断纠纷案] (hereinafter *Yangtze River Pharmaceutical Group*); and Case 5 case taken against a business association, Judgment no.4325 handed down by the Beijing High People's Court in 2013 in *Lou Binglin v Beijing Aquatic Products Wholesale Industry Association* [娄丙林诉北京市水产批发行业协会横向垄断协议纠纷上诉案] (*see further* in (n 129) and accompany text).

[41] Judgments that are published appear on China Judgments Online https://wenshu.court.gov.cn under the auspices of the Supreme Court of China. Many however are neither published nor readily accessible.

been afforded high priority.[42] Such priority has continued subsequent to the adoption of antitrust rules for the first time in the AML 2007: industrial policy implementation has continued to take precedence over compliance with antitrust rules[43] to the benefit of China's now massive SOE's and to the detriment often of its own consumers and private enterprises.[44] Therefore, SAMR 2020 proposals *that antitrust compliance should take precedence over industrial policy*[45] is like putting old wine in new bottles because the AML itself already has provisions in it expressing similar ideas[46], so all that SAMR is doing is repeating an aspiration which is ignored in practice by both State industrial-policy makers and powerful administrative agencies who relentlessly drive industrial rationalisation policies, often to the detriment of consumers and private sector players. Readily observable examples of State industrial policies ignoring antitrust principles include: driving SOE-led mergers in the steel industry without private participants willing agreement[47]; toleration of

[42]. For further discussion on this issue, see, for example, Robert M. Rosse, 'The Working of Communist China's Five Year Plan' (1954) 27 Pacific Affairs 16, which describes the 'Five-Year Plan System', to intensively develop Chinese industry started in 1953; Yao Yang, 'China's Bold New Five Year Plan' (2020) 12(4) East Asia Forum Q. 6 pointing out the 'Five-Year Plan System' has been continued up to the present time; Jin Zeng, *State-Led Privatization in China: The Politics of Economic Reform* (Routledge 2013) 37-39 pointing out industrial policies have been used for decades to drive China's economic development, especially the SOEs, by policies such as 'Grasp the big, release the small' (1995) policy to create large-scale SOEs; Curtis J. Milhaupt and Wentong Zheng, 'Why Mixed-Ownership Reforms Cannot Fix China's State Sector' (2016) Paulson Pol'y Memorandum demonstrating the Mixed-ownership reform (started in 2013) supports the expansion of SOEs via allowing private investment into them.

[43]. While antitrust enforcement in China over the past 13 years (since the AML came into force in 2008) is still largely a matter for *public enforcement*, and while unfortunately, *private antitrust enforcement* has not received any significant attention in the 2020 SAMR's AML reform proposals or the resultant 2021 Bill now out to public consultation: Deng Zhisong and Dai Jianmin, 'A Practical Review of the Draft Amendment to the AntiMonopoly Law of China' Dentons (27 Feb 2020); of course even public enforcement methods have not themselves been as fully effective as might have been expected, due to the exercise of State intervention powers in the market during the different phases of China's economic modernization (i.e., transferring from the "planned economy" model (commencing in the 1950s) to the "market economy" model (commencing in the late 1970s)) and non-truly independent antitrust enforcement agencies: Wang (n 14) 230.

[44]. A typical example would be China's telecom market which has been dominated by SOEs for decades. So for example, the only way for private broadband or telecom competitors to enter the market is to buy network access from SOEs (who themselves provide a competing broadband service). However, without SOEs facilitating "network interoperability", the market share held by private service providers remains miniscule. Therefore, consumers only have limited options due to a lack of genuine competition in the market: *see* further telecoms case study in Dermot Cahill and Jing Wang, 'How Competition Ideals Are Emasculated in Key Industries in China' (2021) 44(3) Fordham Int'l L. J. 609, 635-40.

[45]. SAMR Draft on the Amendment of the AML, Art 4.

[46]. For example, the AML already provides in Arts 1 & 8: Art 1 provides: "the law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy"; Art 8 provides that: administrative agencies should not use their powers to eliminate or restrict market competition: "No administrative organization empowered by law or regulation shall abuse its administrative powers to eliminate or restrict competition."

[47]. Since 2005 when 'Policies for the Development of the Iron and Steel Industry' (2005) was launched, forced

high market-entry barriers in key sectors for non-SOE domestic players (e.g. telecoms industry)[48]; toleration of discriminatory practices by SOEs in the fuel distribution sector[49], etc.. Pursuit of such industrial policies, none of which are competition-neutral, inevitably leads to anti-competitive *practices* by the SOE's themselves, such as, imposing discriminatory pricing without objective justification in the gasoline retail sector[50]; or pushing through forced mergers in the steel industry[51]; or not facilitating network interoperability for private players in the broadband access market[52], etc.. A regulatory

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mergers have become popular in the steel industry. The 'Steel Mills Revitalization Program' (2009) and the 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises' (2016) were implemented to enhance the government-led 'forced' mergers plan. The number of steel mills operating across China was reduced accordingly from more than 7,000 to less than 900 by 2010, with the ultimate objective being to ultimately have no more than 200 enterprises operating in the steel production sector by 2025: 关于推进钢铁产业兼并重组处置僵尸企业工作方案 [Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises] (2016).

[48]. The Telecom Mixed-Ownership reform started in 2016, to allow private funds from large-scale downstream enterprises (e.g., internet enterprises such as Baidu (百度), Tencent (腾讯)) to invest in telecoms SOEs: Daniel Shane, 'China's "Mixed Ownership" Reform to Benefit Investors: China Unicom will Sell Small Stakes to Four Chinese Internet Companies in a Test Case of the Nation's Efforts to Reform Its State-Owned Enterprises' (*Barron's*, 19 Aug 2017) <www.barrons.com/articles/chinas-mixed-ownership-reform-to-benefit-investors-1503111665>. The reforms did not however reduce market entry barriers for private broadband providers; consequently, non-State-owned operators have completely disappeared from the market: Bihui Wu, '三大运营商宽带份额大逆转 中国移动反超电信成第一' [A Broadband Market Share Reversal for Three Operators, China Mobile Surpassing Telecom to Be No.1] (*telworld*, 28 Aug 2019) <https://tech.sina.com.cn/roll/2019-08-28/doc-ihytcitn2500809.shtml>.

[49]. For example, periodic oil shortages occur in filling stations in the Chinese market caused by oil SOEs which do not supply enough refined gasoline to filling stations when they could foresee oil prices would increase shortly due to increasing international prices: *see* the filling station case study in Cahill and Wang (n 44) 627-34.

[50]. *See* 'Notice of the National Development and Reform Commission on Issues concerning Further Improving the Price Formation Mechanism of Refined Oil (Annex: Administrative Measures for Oil Prices)' (2016): In China's oil importation and gasoline supply market (from importers to retailers), a mechanism operates called the Chinese refined oil prices mechanism. Under this mechanism, when oil prices on the global oil market change, then for a 10 day period, refined oil prices can be adjusted, with the outcome that crude oil refining SOEs (which are both major crude oil importers as well as being refiners *and also* major gasoline retailers) can generate substantial profits (or cover losses) using the oil pricing mechanism when they set the price at which they sell to downstream independent high street gasoline retailers. However, the independent retailers cannot adjust their retail prices during this 10-day window, and so application of this mechanism would invariably result in the majority of private filling stations (which are not oil refining importers) often suffering losses during the 10-day period, thereby placing them at a serious competitive disadvantage.

[51]. The forcing of private steel mills to enter into mergers and give up control to SOEs took place largely between 2005-2015, often without the willing participation of the private mill owners: *see* further the steel industry case study in Cahill & Wang (n 44) 641-51. Following this massive industry consolidation which reduced the number of steel mills from 7,000 to under 900 by 2010, the State proceeded to engage in a round of steel SOEs consolidation, for example, Bao Steel (SOE) and Wu Steel (SOE) underwent a government-planned merger in 2016: Luo Guoping, Taozi Wei and Ke Dawei, 'Steel Giants Forge Merger as China Moves to Strengthen State Sector' (Caixin, China, 28 Sept 2018) <www.caixinglobal.com/2018-09-28/steel-giants-forge-merger-as-china-moves-to-strengthen-state-sector-101331148.html>.

[52]. In 2011, two telecoms SOEs, i.e., China Telecom and China Unicom, faced an anti-monopoly probe by the NDRC (the National Development and Reform Commission) *inter alia* to investigate the two SOEs refusal to facilitate "network interoperability", which thereby created market entry barriers for private broadband

environment of this nature, which accommodates SOE-friendly (anti-competitive) practices, therefore still has a major influence in the marketplace across many sectors of the economy.[53] Antitrust regulators do not have a strong record of independent and vigorous enforcement action against SOEs[54], hence SOEs in China's domestic marketplace are not looking over their shoulder when they act in contravention of antitrust prohibitions.

Operating within China's form of State-led economic development environment could explain why the Judiciary has traditionally been comfortable with a lack of competition-neutrality, so the Judiciary's lack of vigorous enforcement enthusiasm for the AML's antitrust provisions against SOEs is probably not unsurprising. Furthermore, commentators observe that Judges will not in general possess a sophisticated understanding of competition law, given its relative youth in China's legal system.[55] Judgments have not signaled an intent to accord primacy to the AML over State industrial policies or SOE's anti-competitive behaviour. This all paints a rather bleak picture of the antitrust enforcement landscape for citizens or enterprises seeking to take private antitrust action under the AML against SOEs.

In making its 2020 reform proposals, SAMR implicitly recognised these Legitimacy and Effectiveness concerns, without expressly so saying, because the 2020 reform proposals

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operators: Wendy Ng, *The Political Economy of Competition Law in China* (CUP 2018) 254; 'Anti-Monopoly Probe into Telecom Giants Confirmed' (China Daily, 9 Nov 2011) <www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm>. The outcome was to require divestment of some market share to *another SOE*, rather than to private competitors.

[53]. For example, although the Mixed-Ownership Reform policy introduced in 2013 was designed initially to encourage private investment in SOEs in seven major sectors, traditionally controlled by State (electricity, crude oil, natural gas, railways, civil aviation, telecoms, and defense sectors), and was (in 2019) further expanded to cover *zombie* SOEs, however, in reality what occurred was that SOE's formed alliances through these investments with key major private businesses to *expand the SOE's business* reach *into* the private sector, expanding their influence into new markets initially developed by private enterprises e.g., China Unicom received investment from China's 3 leading private enterprises: Baidu (China's equivalent to Google); Alibaba (阿里巴巴) (China's equivalent to Amazon); and Tencent (China's equivalent to Facebook), thereby expanding China Unicom's reach and influence *over these new industries*: Zheng Xin, 'Mixed Ownership Reform Expanded' *China Daily* (23 Dec 2016) <www.chinadaily.com.cn/kindle/2016-12/23/content_27756291.htm>; by June 2017, 48 SOEs had completed Mixed-ownership reforms: *see* David Stanway and Jing Wang, 'China State Firms Complete 48 'Mixed Ownership' Reforms This Year: Paper' (*Reuters*, 21 June 2017) <http://uk.reuters.com/article/us-china-soe/china-state-firms-complete-48-mixed-ownership-reforms-this-year-paper-idUKKBN19C09K>; and on the zombie enterprises: *see* Zhong Nan, 'Mixed-Ownership Reform in SOEs to Be Expanded' *China Daily* (18 Jan 2019) <www.chinadaily.com.cn/a/201901/18/WS5c411273a3106c65c34e5231.html>.

[54]. Xiaoye Wang, 'Six Severe Challenges in Implementing China's Anti-Monopoly Law' (2018) 14 Comp. Pol'y Int'l 3-4; Peter J. Wang, Yizhe Zhang and Qiang Xue, 'The Integration of Chinese Anti-Monopoly Enforcement Authorities' (2018) The Antitrust Source 5-6.

[55]. Mark Williams (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar 2013) 96; Wang (n 14) 227.

specified that the AML should make it clear that no industrial policy or administrative power should have primacy over antitrust law[56], i.e., over the AML. In other words, although SOEs thrive under State-promoted industrial policies, that should not mean that their market behaviour should allow them to infringe the AML's antitrust prohibitions without consequence. However this does not set a new starting point in this area, because that is already stated to be the position in the AML itself since 2007[57], so this is merely a more expansive[58] restatement of something that is already supposed to be the case *as a matter of law*.[59]

3.3 Competition-Neutrality: the Inadequacy of the 2020 Proposed Reforms

2020 saw SAMR launch its consultation on its proposed reforms to the AML.[60] SAMR proposed several reforms[61], including two reforms which were designed to deal with

[56]. SAMR Draft on the Amendment of the AML, Art 9 which provided that all industrial policies should undergo a fair competition review to ensure they do not constrict application for the AML. This proposal has been carried forward into the 2021 Bill ("Amendments to Anti-Monopoly Law of China") as Article 5.

[57]. AML, Art 8 provides: "No administrative organization empowered by law or regulation shall abuse its administrative powers to eliminate or restrict competition."

[58]. SAMR Draft on the Amendment of the AML, Art 9; now appearing in the 2021 Amendments to Anti-Monopoly Law of China Bill, Art 5.

[59]. SAMR Draft on the Amendment of the AML, Art 4 (stating that the government should maintain a neutral position in the market, i.e., the government should not influence the market by means of promoting policies that are anti-competitive in nature); now appearing in the 2021 Amendments to Anti-Monopoly Law of China Bill, Art 4.

[60]. As new markets were developing it became obvious that the AML needed to be revised to accommodate new forms of activity, such as developing digital markets, plus in addition the government also wished to elevate the primacy for competition law in the marketplace, e.g., aiming to achieve competition-neutrality instead of treating industrial policy as a superior priority over competition. SAMR also sought enhanced powers to boost achieving the AML's competition protection objectives. For some early commentary on why reform of the AML is needed: Fay Zhou, Arthur Peng, Vivian Cao and Xi Liao, 'Proposed Amendments to China's Anti-Monopoly Law: What are the Changes and What to Expect?' (2020) Comp. Pol'y Int'l. The 2020 consultation has now closed and in 2021 a Bill appeared taking the SAMR proposals forward: the 2021 Bill, titled "Amendments to Anti-Monopoly Law of China" was put out to public consultation until 21 November 2021 and is expected to be enacted some time in 2022. Though note that, as will be explained further in this article, the reform proposals will not cure the Antitrust Legitimacy and Effectiveness problem identified by the Authors via the courts handling of private antitrust enforcement proceedings against SOEs.

[61]. As well as the two proposals about to be considered, SAMR also made three other proposals for AML reform which fall outside the scope of this article because they were proposed to improve the antitrust regime in general, without specific reference to SOEs, namely suggestions were proposed for (1) improving merger control under the AML; (2) introducing a criminal cartel offence into the AML for the first time (though no further details were provided, such as standard of proof or penalties; and (3) proposals concerning network effects, lock-in effects and data network effects when defining an undertaking's dominant market position in digital markets: *see* Draft on the Amendment of the AML, Arts 23(3), 24(2), 51; Art 57; Art 21, respectively. These three "out of scope" proposals have been well covered in the literature: *see* Zhou, Peng, Cao and Liao (n 60); H. Stephen Harris, 'China Set to Revise Its Anti-Monopoly Law with More Aggressive Provisions' Winston & Strawn LLP (10 Jan 2020) <www.winston.com/en/competition-corner/china-set-to-revise-its-anti-monopoly-

problems arising with the AML's application to SOEs: (1) SAMR proposed that the competition-neutrality should be affirmed in China's marketplace, so that it should be clear that industrial policy does not have primacy over antitrust enforcement (i.e., to stop antitrust being subservient in the pursuit of State industrial development policies)[62]; and (2) SAMR proposed that regional administrative authorities[63] must cease protecting local monopolies by way of anti-competitive administrative measures.[64]

While these proposals are to be commended, it is submitted that neither of these measures will be sufficient to alter the approach adopted by *the courts in China*, which frequently sidelines the application of the AML in antitrust prohibitions in cases involving SOEs, taken by either consumer or private enterprise litigants. Hence, AML Effectiveness and legitimacy concerns will persist.

So far as the first SAMR proposal is concerned (desiring competition-neutrality and primacy of the AML over industrial policy priorities), SAMR's concern is that China's government-oriented economic model has traditionally not prioritised the AML's antitrust regime in practice since the AML's enactment in 2007.[65] SAMR wants a revised AML to make it clear that the AML should be accorded precedence over industrial policies.[66] This is now reflected in the 2021 Bill (Amendment of Anti-Monopoly Law, Arts 4 & 5). However, the reality is that the AML was intended to have been accorded such primacy since its

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law-with-more-aggressive-provisions.html>.

[62]. SAMR Draft on the Amendment of the AML, Art 4 and now appearing in the 2021 Amendments to Anti-Monopoly Law of China Bill, Art 4 (which proposes the following sentence to be added into a revised AML Art 4: "The State strengthens the fundamental position of competition regulation [...]").

[63]. Anti-competitive administrative measures could be applied by local administrative agencies, such as provincial governments, city and town level governments across the country, etc.

[64]. Such as creating market barriers and restricting the flow of products by imposing discriminatory prices; or, imposing different standards for local products and non-local ones; or, granting administrative licenses for non-local products to enter into the local market. SAMR proposes Draft Art 9 in Draft on the Amendment of the AML to deal with this problem by providing: Art 9: The State establishes and implements a fair-competition review system, in order to regulate government administrative actions and prevent industrial policies from restricting competition. This proposal now appears as Act 40 in the 2021 Amendment Bill. For research on *administrative monopolies in China and why they are problematic from the AML perspective*: Yichen Yang, 'The Anti-Monopoly Enforcement Authorities vs Administrative Agencies: It's Time to Reconstruct their Relationship when Dealing with Administrative Monopoly in China' (2019) 10 J. European Comp. L. & P. 379; Zhangjiang Zhang and Baiding Wu, 'Governing China's Administrative Monopolies under the Anti-Monopoly Law: A Ten-Year Review (2008-2018) and Beyond (2019) 15 J. Comp. L. & Econ. 718; Qian Hao, 'An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution' in C. Cauffman and Q. Hao (eds), *Procedural Rights in Competition Law in the EU and China, vol.3* (Springer 2016) 39.

[65]. Wang (n 14); Mark Furse, 'Evidencing the Goals of Competition Law in the People's Republic of China: Inside the Merger Laboratory' (2018) 41 World Competition 129, 168; Yong Huang and Baiding Wu, 'China's Fair Competition Review: Introduction, Imperfections and Solutions' (2017) 3 Comp. Pol'y Int'l; Angela HY Zhang, 'The Antitrust Paradox of China Inc.' (2017) 50 NYU J. Int'l L. & Pol'y. 159.

[66]. SAMR Draft on the Amendment of the AML, Arts 4 & 9.

inception[67], but neither China's drive for rapid economic development nor judicial practice have observed its stature among other State priorities,[68] and so, despite some measure of *public* enforcement[69], the AML has neither been accorded primacy over government industrial policies nor over the commercial interests of SOEs since its enactment in 2007.

SAMR's second proposal seeks to prohibit administrative agencies from abusing their powers to intervene in local provincial-level markets in an anti-competitive fashion to protect local players. This proposal sought the establishment of a "fair competition review

[67]. Angela HY Zhang, 'Strategic Public Shaming: Evidence from Chinese Antitrust' (2019) 1 China Q. 1; Neal D Woods, 'Regulatory Analysis Procedures and Political Influence on Bureaucratic Policymaking' (2018) 12 Reg. & Gov. 299.

[68]. AML Art 7(2) provides: SOEs are subject to the AML. However, the Chinese government-oriented economic model has overlooked the AML in practice: H. Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) Forward; Bruce M. Owen, Su Sun and Wentong Zheng, 'China's Competition Policy Reforms: the Anti-Monopoly Law and Beyond' (2008) 75 Antitrust L. J. 231. Indeed, SAMR itself (as recently as 2019) released Policy No. 245, titled 'Notice by Four Departments Including the State Administration for Market Regulation of Conducting the Review of the Policies and Measures Impeding the Unified Market and Fair Competition' [市场监管总局等四部门关于开展妨碍统一市场和公平竞争的政策措施清理工作的通知] requiring administrative agencies across the country to repeal and/or amend any policies which are anti-competition, yet anti-competition industrial policies still exist across many sectors of the economy: *see* (n 72).

[69]. This is not to say that there has not been a measure of *public enforcement* of the AML: of 55 abuse of dominance investigations initiated by either SAMR or its predecessors, taken in the period 2008-2018 (38 of which were accessible to the Authors, and 17 not) of those 38 we gained access to, fines were issued in 29 investigations, of which 7 investigations involved privately-owned companies with fines imposed ranging between RMB 209,000 to RMB 21m (approximately USD $30,000 to USD $3m); 3 further investigations involved foreign companies with fines ranging between RMB 667m to over 6.08bn (approximately USD $98m to USD $975m); while 19 investigations involved SOEs with fines ranging between RMB 17,000 to RMB 25m (approximately USD $2,500 to USD $3.7m). It can be observed from the forgoing that it appears that fines imposed on SOE's tended to fall on the less severe side where SOE's were the infringing party. The remaining 9 abuse of dominance investigations were terminated, with 7 of those 9 investigations involving SOEs. In the same period, of 165 cartel investigations (e.g., price-fixing, markets sharing) undertaken by SAMR or its predecessors (the Authors managed to gain access to 74 such investigations in the same period 2008-18): fines were issued in 72 of those 74 investigations. An interesting picture emerges when the fining data is analyzed: just as with the fining pattern in the data on abuse of dominance investigations above, domestic players, including SOEs, appear to be fined less severe levels of fine based as a percentage of turnover. Of the 72 investigations examined, 29 investigations were taken against privately-owned companies with fines ranging between RMB 100,000 to RMB 142m (approximately USD $14,085 to USD $20m); 28 investigations against business associations with fines ranging between RMB 100,000 to RMB 110m (approximately USD $14,085 to USD $16.2million); 7 investigations involved foreign companies with fines ranging between RMB 2.17m to over 1.24bn (approximately USD $318,000 to USD $181.7m); 8 investigations involved SOEs (& SMEs) with fines ranging between RMB 200,000 to RMB 457m (approximately USD $29,400 to USD $67m)). The aforementioned 7 cases involved 36 foreign companies: 30 (out of 37) foreign companies were fined; with 5 having fines imposed on them equivalent to 1%-2% of annual turnover, and the remaining 25 had fines imposed on them of between 3%-7% of annual turnover. By contrast, in the 8 investigations involving domestic SOE's (and some domestic SMEs), 18 (out of 22) SOEs were fined; 14 were fined 1%-2% of annual turnover; 2 were fined 3% of annual turnover, and 2 were fined 5% of annual turnover. Investigations were terminated in 2 anti-competitive agreement cases: 1 investigation involved SOEs and the other involved a business association: Shi, Dai and Jiao (n 11).

system"[70], so that administrative agencies and organisations authorised by laws and regulations to manage public affairs would henceforth be obligated to comply with the AML, rather than acting in disregard of the AML's competition principles.[71] The purpose of this proposal seeks to ensure markets will comply with competition rules, with only limited and necessary intervention henceforth by administrative authorities, with the objective of elevating the priority of the AML in the marketplace.

However, the frailty with this proposal is twofold: first, will it make any difference to the status quo, where protectionist intervention by administrative agencies is widespread at provincial or even more local level; and second, the mooted fair competition review system was only intended to curtail the interventionist behaviour of *provincial (and lower level)* administrative agencies[72], but not the more powerful *State-level* agencies.[73] Steps to address this lack of scope of coverage have been taken in SAMR's *2021 Fair Competition Review Implementation Guidance*, which states that all policies relating to market competition should undergo Fair Competition Review before being released.[74] Only time will

[70]. SAMR Draft on the Amendment of the AML, Art 9. This proposal has made its way into the 2021 Bill via Art 5.
[71]. SAMR Draft on the Amendment of the AML, Art 42. This proposal has made its way into the 2021 Bill via Art 40.
[72]. In 2019, SAMR released Policy No.245 policy, titled 'Notice by Four Departments Including the State Administration for Market Regulation Conducting the Review of the Policies and Measures Impeding the Unified Market and Fair Competition'. This required administrative agencies across the country to repeal and/or amend any policies that are anti-competition. Hence, for example, Zheng Shengzhu, 'Jiangsu Cleaning Up Over 60,000 Local Policies Impeding the Unified Market and Fair Competition' *Xinhua, China* (8 July 2020) <www.xinhuanet.com/2020-07/08/c_1126210920.htm> describes how, by July 2020, more than 60,000 local policies in *Jiangsu* (江苏) Province (near Shanghai) had been reviewed; 'Effective Results Achieved in Gansu Province Regarding the Review of the Policies and Measures Impeding the Unified Market and Fair Competition' *Gansu Administration for Market Regulation, China* (24 Aug 2020) <http://scjg.gansu.gov.cn/info/4516> describes how, by August 2020, in *Gansu* (甘肃) Province (north west in China) 620 local anti-competition policies were repealed and another 93 local anti-competition policies were amended.
[73]. e.g., industrial policy makers, such as the State Council (equivalent to the Government), which promulgated policies such as 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises' in 2016, some 8 years after the AML came into force: SAMR 2020 proposals did not subject such high level institutions policies to the proposed fair competition review system. However, in 2021 SAMR's Fair Competition Review Implementation Guidance provides that the policies of all institutions, irrespective of level, will be subject to the 2021 Guidance. Consequently, only time will tell whether State-level bodies can continue to promulgate policies which allow the State Council to promote market interventions which ignore antitrust considerations, e.g., the 2016 policy of continually speeding up 'administrative mergers' (i.e., forcing steel mills mergers, irrespective of steel mill owners wishes) in the nationwide steel industry until 2025, without considering AML antitrust / merger control implications; another example would be the State's 2020 'Three-Year Action Plan for State-Owned Enterprise Reform (2020-2022)' which has not taken the AML into account in its formulation, as it will allow SOEs take controlling interests in industries without undergoing fair competition review.
[74]. SAMR Fair Competition Review Implementation Guidance 2021, Art 3.

tell whether this 2021 Guidance will be applied to central government level industrial policies in the future.

These two key proposals by SAMR are clear evidence that even high-ranking bodies such as SAMR[75] are concerned that the AML lacks Legitimacy and Effectiveness in the eyes of the State's industrial policy makers and administrative agencies. However, a key weakness of SAMR's proposals identified by the Authors is that they do not cover the courts *per se*. SAMR did not advance any proposals to tackle this problem. Neither of the proposals advanced by SAMR (discussed immediately above) seem to be sufficiently focused on the problem of how the courts' approach the AML's application in cases involving SOEs, and it is to this Legitimacy and Effectiveness problem that we now turn.

4. LEGITIMACY & EFFECTIVENESS CONCERNS in PRIVATE ANTITRUST CASES AGAINST SOEs

In this section we consider leading cases to demonstrate how the AML is applied in court decisions. The AML prohibits certain types of classic anti-competitive behaviour, such as prohibiting price fixing (Article 13); restricting resale prices (Articles 14); and prohibiting abuse of dominant position (Article 17). Appropriate comparisons will be made with EU jurisprudence to illustrate the contrast in application of similar antitrust prohibitions found in both legal systems to address the question of the Judiciary's acceptance of the AML's Legitimacy and Effectiveness. This is not a matter of another legal system taking a different view - the AML has transplanted EU antitrust-style prohibitions into China's law[76] - as clear examples will be shown of how the courts do not pay due regard to the AML anti-competition prohibitions when formulating their judgments. While the main focus shall be on leading judgments delivered in cases involving SOE defendants taken by either private enterprise plaintiffs or private persons, along the way we shall also allude to antitrust judgments delivered by China's courts in antitrust cases taken against non-SOE defendants, if only to illustrate how similar Legitimacy and Effectiveness concern arise in cases taken against non-SOE defendants (i.e., private defendants) as well. In either category, the judgments exhibit how the courts in China, by virtue of their reasoning, are de-emphasising the express terms of the AML when reaching judgment.

[75]. Which is under the direct supervision of the State Council, i.e., the top decision making State body.
[76]. Federico (n 13).

4.1 Legitimacy Concerns in Private Antitrust Cases Against SOE's initiated by Private Enterprises

First we look at private antitrust cases taken in China against SOEs by plaintiff *private enterprises*. As the Judgments will demonstrate, these plaintiffs find themselves in a largely unsympathetic position in the courts when bringing antitrust actions against SOEs. To begin with, there have been *no successful cases* taken by private enterprise plaintiffs against SOEs to date, so we cannot comment on *Effectiveness* of antitrust remedies in such cases because no AML remedies have been awarded. However, we can comment on *Legitimacy* concerns, which are demonstrated by the non-application of clear AML antitrust prohibitions in leading cases, which can be observed in mainstream antitrust contexts such as price-fixing and abuse of dominance. As the analysis below will reveal, the outcomes in China's courts are contrary to how a European Union court would approach applying such similar fundamental antitrust prohibitions, notwithstanding the terms of the antitrust prohibitions are common to both systems.[77] Let us now consider some specific examples.

4.1.1 Minimum Pricing: *Hengli Guochang v Gree*[78]

The case law demonstrates that first, it is difficult to convince the judicial or regulatory authorities that even obviously anti-competitive behaviour by SOEs, such as price-fixing which is clearly condemned by the AML itself[79], should be condemned as being anti-competitive, even when clearly such circumstances are present. This observation is amply

[77]. In summary, Art 101 TFEU prohibits anti-competitive agreements (e.g., market sharing, price-fixing) that affect trade between EU Member States where their anti-competitive effects outweigh pro-consumer or pro-industry innovation / distribution of goods or services benefits: AML Arts 13-15 corresponding contain prohibitions which are broadly similar to those found in Art 101 TFEU. Art 102 TFEU prohibits abuses of dominant position that affect trade between European Union Member States, i.e., behaviour by a dominant market player whose purpose is to use abusive (prohibited) practices to destroy competition in the market (such as by granting illegal fidelity rebates; boycotting; refusal to supply customers without objective justification; predatory pricing, etc.): Art 17 AML contains corresponding abuse of dominance prohibitions which are broadly similar to those found in Art 102 TFEU.

[78]. Judgment no.1771 handed down by the Guangdong High People's Court in 2016 in *Dongguan Hengli Guochang Electrical Appliance Store v Dongguan Shengshi Xinxing Gree Trading Co., Ltd. and Dongguan Heshi Electric Appliance Co., Ltd.* [*东莞市横沥国昌电器商店诉东莞市晟世欣兴格力贸易有限公司、东莞市合时电器有限公司纵向垄断协议纠纷上诉案*] (hereinafter *Hengli Guochang v Gree*).

[79]. AML, Art 14(2): "Any of the following agreements among business operators and their trading parties are prohibited: […] (2) restricting the minimum price of commodities for resale to a third party […]". AML, Art 13 prohibits price-fixing agreements.

demonstrated in the case of *Dongguan Hengli Guochang Electrical Appliance Store v Dongguan Shengshi Xinxing Gree Trading Co., Ltd. and Dongguan Heshi Electric Appliance Co., Ltd.* (2016). In this case, an SOE, *Dongguan Shengshi Xinxing Gree Trading Co., Ltd.*, attempted to impose minimum sale prices on dealers and distributors selling air conditioning equipment. Article 13 AML prohibits price-fixing agreements; and Article 14 AML prohibits minimum prices agreements. Notwithstanding the facts pointed to a clear breach situation of these prohibitions, the court held that the agreement was not anti-competitive by observing that the resale price agreement did not restrict the plaintiff from selling air conditioners produced by other competitors, and so, in the court's eyes (Guangdong High People's Court) the agreement did not restrict competition in the market in Dongguan city. Such a Judgment exhibits clear Legitimacy concerns: price-fixing, expressly prohibited by the AML[80], evidenced in this case by a price-fixing agreement, was nevertheless disregarded by the court and the justifications advanced reveal a lack of understanding of why price-fixing is injurious to competition. This approach raises serious Legitimacy concerns because it shows how the express terms of the AML (Arts 13 and 14 prohibiting price-fixing and minimum prices) are disregarded in the judiciary's legal reasoning, notwithstanding that the AML clearly prohibits such practices as being anti-competitive.

In the European Union by contrast, *price-fixing* is regarded as a hardcore breach of antitrust law: the mere fact that there are other competitors operating in the market does not exempt attempts at price-fixing[81] from a finding of illegality (and the imposition of large fines[82]). The European Commission has condemned *minimum price* agreements on many

[80]. *ibid*.

[81]. e.g., Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2010] ECLI:EU:C:2009:610, where the Court of Justice of the European Union held that a dual pricing arrangement by GSK to ensure a higher price would be charged for Spanish export sales infringed Art 101(1) TFEU); Case COMP/C.38.281/B.2 *Raw Tobacco Italy* [2006] OJ L 353-45 saw the European Commission found a number of Italian raw tobacco processors agreements to fix prices had infringed Art 101(1)); Case IV/27.958 *National Sulphuric Acid* [1980] OJ L 260/24 saw the European Commission deciding that the rules of a purchasing pool which the members of the National Sulphuric Acid Association were bound to, restricted competition and therefore infringed Art 101(1)).

[82]. For cases where large fines were imposed for infringement of Article 101 TFEU on anti-competitive cartels, *see* Case C-338/00 P *Volkswagen AG v. Commission* [2003] ECLI:EU:C:2003:473, where the Commission fined Volkswagen AG EUR €102m for infringing Art 101 TFEU. For a notable example of where large fines were imposed for abuse of a dominant position, *see, e.g.,* European Commission Decision, Case COMP/C-3/37.792 *Microsoft* [2007] OJ L 32/23, where the Commission fined Microsoft EUR €497m for infringing Art 102 TFEU, with the fining decision upheld by the General Court of the European Union, in Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289.

occasions[83], only contemplating allowing such anti-competitive measures where there could be strong justifications advanced, such as being necessary to bring a new product to market; or bringing about significant efficiencies; or improved services benefiting consumers.[84] Similarly, the Court of Justice of the European Union has on many occasions condemned price-fixing[85], *including where imposed by the State or State controlled entities*, including in the minimum pricing context.[86] By contrast, the Guangdong High People's Court in *Dongguan Shengshi Xinxing Gree Trading Co., Ltd.* offered no such justifications like that we find in EU Law, other than observing that the presence of other competitors in the market and the agreement not restricting the plaintiff from dealing in competitors' products, allowed the court to hold that the contested agreement could not be regarded as anti-competitive. This reasoning is questionable and is not convincing at excusing, what was a clear attempt at price-fixing, from rigorous scrutiny under the AML's anti-competitive prohibitions. AML Articles 13 and 14 were pleaded before the court, but the court saw the minimum pricing arrangement as being for the good of society (without giving any further elaboration), thus suggesting that the court did not give proper regard to the express prohibitions in Articles 13 and 14 AML which *expressly* condemn price-fixing and imposition of minimum prices.

4.1.2 Abuse of Dominant Position - *Bao Cheng*[87] and *Baidu*[88]

The second situation we consider is the 2012 case of *Bao Cheng*: another Legitimacy

[83] *Deutsche Phillips* [1973] OJ L 293/40; *GERO-fabriek* [1977] OJ L 16/8; *Hennessey/Henkel* [1980] OJ L 383/11.

[84] Such improvements in distribution of goods and services of benefit to consumers which would merit an exemption under TFEU Art 101(3): see further the European Commission *Vertical Guidelines* OJ [2010] C 130/1.

[85] e.g., Case 243/83 *SA Binon & Cie v. SA Agence et Messageries de la Presse* ECLI:EU:C:1985:284; C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ECLI:EU:C:1977:167.

[86] e.g., the Court of Justice condemned the imposition of minimum sale prices of tobacco products, which in turn restricted price competition between such products: Case C-197/08 *Commission v France* ECLI:EU:C:2010:111; Case C-198/08 *Commission v Austria* ECLI:EU:C:2010:112; Case C-221/08 *Commission v Ireland* ECLI:EU:C:2010:113; Case C-216/98 *Commission v Greece* ECLI:EU:C:2000:571. See Angus David Macculloch, 'State Intervention in Pricing: An Intersection of EU Free Movement and Competition Law' (2017) 42 European L. R. 190.

[87]. Judgment no.4 handed down by the Jiangsu High People's Court of China in 2012 in *Wuxi Bao Cheng Vehicle Cylinder Inspection Co. Ltd v Wuxi China Resources Vehicle Gas Co., Ltd.* [*无锡市保城气瓶检验有限公司诉无锡华润车用气有限公司拒绝交易纠纷上诉案*] (hereinafter *Bao Cheng v Wuxi China Resources*).

[88]. Judgment no.489 handed down by the Beijing High People's Court of China in 2010 in *Tangshan Renren v Baidu* [*唐山市人人信息服务有限公司诉北京百度网讯科技有限公司滥用市场支配地位纠纷上诉案*] (hereinafter *Renren v Baidu*, or *Baidu*).

example which demonstrates how the AML's abuse of dominant position prohibition is applied using judicial legal reasoning that runs counter to the AML's express terms prohibiting abuse of dominance.[89] We shall see how the court takes this approach in cases involving SOEs (*Bao Cheng*) *and* non-SOE defendants (*Baidu*). First, SOEs: in *Bao Cheng*, China Resources, an SOE, was the only supplier of natural gas for vehicles in the city of Wuxi.[90] It was held not to have abused its dominant position when it refused to supply the Bao Cheng Company with fuel. Refusal to supply is contrary to AML Art 17, which prohibits dominant players from not trading with others, without objective justification. [91] Demonstrating that the reasoning in this Judgment is open to question, the court did not accord significance to the fact that the refusal to supply by the dominant (indeed the only) supplier of natural gas fuel appeared to lack an objective quality about it, because the supplier *continued to supply other operators, while refusing to supply Bao Cheng, thus undermining its claim to be short of fuel*. The Court accepted the defendant SOE's claim that it did not have enough fuel for the purposes of supply to local vehicles, *without giving due regard to this key fact* (*that other customers continued to be supplied by the SOE*)*;* nor did the court accord weight to the fact that the SOE confirmed that Bao Cheng was the only customer who had been refused supply. In the EU, an existing customer of a dominant company cannot be refused or suffer reduced supplies of orders that are not out of the ordinary, without an objective justification.[92] Bao Cheng appeared to be the only operator the SOE would not supply: the grounds advanced by China Resources to support its justification for refusal to supply (that it did not have enough fuel) *was left unchallenged* by the court, even though it was admitted in court that the SOE continued to supply other customers.

This judicial reasoning in *Bao Cheng* demonstrates how the court's understanding of competition principles applicable to refusal to supply did not take the prohibition on refusal to supply set out in Article 17 AML into account, nor the requirement to only allow it where an objective justification can be advanced. Bao Cheng argued before the court that Article 17 was breached. Yet the Court disregarded the evidence (presented before the court) that

[89]. AML, Art 17 prohibiting abuse of dominant position.
[90]. A city near Shanghai.
[91]. AML, Art 17(3) provides: an undertaking with a dominant position shall not abuse the dominant position by "[...] refusing to trade with a trading party without any justifiable cause".
[92] e.g., Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22 (hereinafter *United Brands*).

the reason Bao Cheng had been refused supplies was because it had made a complaint about China Resource's management personnel, i.e., the refusal to supply looks very much like it was based on *non-objective reasons*. This could not ordinarily constitute an objective justification for refusing to supply. The court in effect ignored Article 17's requirement for a dominant supplier to have an objective reason for not supplying a customer.

This judicial reasoning employed in *Bao Cheng* demonstrates a marked contrast between how the courts in China and the courts in the European Union apply the abuse of dominance concept and refusal to supply principles. European Union competition jurisprudence sets very strict requirements before a dominant supplier can refuse or restrict supplies to a customer: for example, the Court of Justice has held that a dominant player cannot stop supplying long standing customers where the customer's orders are in no way out of the ordinary and where there is no objective reason to refuse or restrict supplies (United Brands)[93]; nor where the refusal to supply rationale was to eliminate a competitor from a downstream market, in circumstances where there were few other suitable alternative sources of supply of a key raw material (*Commercial Solvents*).[94] The European Commission has condemned a dominant player's refusal to supply a downstream market in order to weaken its competitor (*Boosey & Hawkes*) as not being based on an objective justification.[95] The prohibition on dominant suppliers not to refuse supplies without objective justification is therefore common to both legal systems, yet with very different outcomes. Consequently, once again the Legitimacy of the AML is called into question by the judicial application (or rather non-application) of the AML in court decisions such as *Bao Cheng*.

This concern about the Judiciary's approach to application of the AML's abuse of dominance prohibition can similarly be seen in major antitrust cases taken against *private defendants,* i.e., non-SOE antitrust defendants). In *Baidu*[96], China's equivalent of Google, the court's approach to the question of dominance raises similar AML Legitimacy concerns. The criticism of this judgment is that the court did not find Baidu occupied a dominant position even though Baidu held a 73.2% market share in China's search engine market in 2008

[93]. *ibid*.
[94]. e.g., Cases 6&7/73 *Istituto Chemioterapico Italiano Spa & Commercial Solvents v Commission* ECLI:EU:C:1974:18.
[95]. e.g., Case IV/32.279 *BBI/Boosey and Hawkes (Interim Measures)* [1987] OJ L286/36.
[96]. Judgment no.489 handed down by the Beijing High People's Court of China in 2010 in *Renren v Baidu*.

(when the case was heard).[97] The court held that the market was competitive given the presence of several far smaller competitors. While one might initially have some sympathy for this view given this was a technology case, and EU antitrust jurisprudence accepts that high market shares are not always presumed to be indicative of dominance in technology cases where market shares can rapidly rise and fall over short term periods[98], unlike say in more mature markets involving manufactured goods or services, nevertheless the judgment can be criticised for not finding Baidu dominant when one looks at how Baidu has maintained its superior leading position in the China search engine market in China right up to the present day: Baidu's competitors' market shares continue to remain consistently low over the last 11 years since the judgment was delivered. At the time of the judgment (2010) Baidu's nearest rival was Google, which held a mere 19.6% market share (and it has since departed the China market). Other smaller competitors at that time held very small market shares: Sogou (1%), ZhongSou (0.5%), with others (e.g., Sousou, NetEase) holding only 3.5% between them.[99] By 2020, Baidu remains unquestionably dominant, holding 66.15% of the search engine market in China, with its next nearest competitor, Sogou holding a 22.06% market share, and the remaining 11% held between small dispersed competitors.[100] Against this background, a finding of "no dominance" appears difficult to justify, hence similar AML Legitimacy concerns arise in antitrust cases taken against private defendants, as much as they do when defendants are SOEs.

[97] In Case C-62/86 *AKZO Chemie BV v Commission*, T-286/09 *Intel Corporation Inc. v Commission* [2014] ECLI:EU:T:2014:547 (hereinafter *AKZO*), the Court of Justice of the European Union found that a market share of over 50% in the flour milling chemicals market conferred a presumption of dominance. Markets shares in the 40-50% percentile can confer dominance where the presence of other advantages confer superior market power on the largest player in the market, such as having vertical distribution advantages over competitors (*United Brands*); or intellectual property rights (Case T-51/89 *Tetra Pak Rausing SA v Commission* ECLI:EU:T:1990:41; Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* ECLI:EU:C:2015:47); or holding leading brands (Case 85/76 *Hoffmann-La Roche & Co v Commission* ECLI:EU:C:1979:36); or first mover advantage (Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* ECLI:EU:T:2010:266); or possessing superior technology (*Hoffmann-La Roche*); or possessing ownership of an essential facility (Case T-336/07 *Telefónica and Telefónica de España v Commission* ECLI:EU:T:2012:172); etc.

[98] European Commission Decision, Case COMP/C-3/37.792 *Microsoft* [2007] OJ L 32/23; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2020:69. In these cases Microsoft and Google held market shares of over 90% and 90% respectively, the court finding that market share of such high level confirmed dominance on their own, without needing to consider other factors.

[99]. Zhou Hongmei, '2010 第四季度中国搜索引擎市场份额' [China Search Engine Market Share in the Fourth Quarter of 2010] *Beijing Times* (26 Jan 2011).

[100]. Zhang Weijia, '2020 年中国搜索引擎行业市场现状及发展前景分析 百度龙头地位稳固' [2020 Search Engine Market and Development Prospects, Baidu's Leading Position is Stable] *The Economist* (7 Sept 2020).

4.1.3 Refusal to supply: *Yunnan Yingding v Sinopec*[101]

A third situation raising an AML Legitimacy red flag for AML enforcement can be seen in the 2014 Judgment in *Yunnan Yingding Bio Energy Co., Ltd. v Sinopec Sales Co., Ltd. Yunnan Kunming Petroleum Branch*, which involved an AML private antitrust enforcement action taken by a privately owned SME against a global scale SOE (Sinopec). Based in Kunming in southwestern China, the plaintiff challenged Sinopec's refusal to purchase biofuels from it. The plaintiff's case was based on the obligation contained in the *Renewable Energy Law of China 2005*[102], which obligated fuel-selling SOEs such as Sinopec to purchase fuel from producers (like the plaintiff) as long as the fuel met certain production and technical standards. The court failed to find in favour of the plaintiff, holding that although the defendant SOE (Sinopec) had refused to purchase biofuel from the plaintiff, this could not be termed an abuse of its dominant position. The court based its decision on non-competition grounds, namely that Yunnan province (where the plaintiff was based) had not published any relevant regulations to guide transactions in biological liquid fuel sales. Accordingly, the court held that the defendant (SOE) was not obligated to purchase biofuel from the plaintiff, notwithstanding the clear terms of the 2005 law.[103] This seems an invidious decision: a State company was allowed to escape its legal obligation to trade with an enterprise on the grounds that the State itself (the SOE's controller) had not seen to it that relevant local regulations designed to oblige the SOE to trade in said fuels were adopted, *some ten years* following the enactment of the 2005 fuel purchase obligation. Again, this calls into question the legitimacy of the AML in the eyes of the Judiciary in China because the AML's clear terms (prohibiting abuse of dominance) are being ignored, and

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[101]. Judgment no.122 handed down by the Yunnan High People's Court of China in 2017 in *Yunnan Yingding Bio Energy Co., Ltd. v Sinopec Sales Co., Ltd. Yunnan Kunming Petroleum Branch* [*云南盈鼎生物能源股份有限公司诉中国石化销售有限公司云南石油分公司、中国石化销售有限公司拒绝交易纠纷案*] (hereinafter *Yingding v Sinopec*) was the first antitrust civil action taken against a central SOE (i.e., an SOE controlled by the State Council, in other words by the Central Government) by an SME, alleging refusal to trade contrary to Art 17(3) AML): *see*, *e.g.*, Li Chunlian, '石油行业打响反垄断第一枪，能源破垄断改革先行' [The First Private Anti-Monopoly Case in the Chinese Petroleum Industry: Reform should Go Ahead to Break Monopolies] *Securities Daily* (21 Aug 2021).

[102]. The Renewable Energy Law of China 2005, Art 16(3) *inter alia* stipulated that "[...] petroleum sales enterprises [i.e., mainly SOEs] shall, in compliance with the regulations of the energy administration department under the State Council or People's governments at the provincial level, include biological liquid fuel that conforms to State standards in their fuel-selling system."

[103]. Shi, Dai and Jiao (n 11) 279.

instead judgment was given based on non-AML grounds in circumstances where the SOE should not be allowed to take advantage of its owner's legislative inertia.

Qihoo 360 v Tencent (2013)[104] illustrates an AML Legitimacy example in the *private defendant* antitrust context, presenting a perfect example of where abusive leveraging behaviour by a private defendant, contrary to AML Article 17, was not condemned by the courts in circumstances where it would be rigorously examined under EU abuse of dominance leveraging case law.[105] In *Qihoo 360 v Tencent*, the plaintiff offered consumers a security-protection tool along with its updated antivirus software because consumers were concerned that Tencent's instant messaging program (the non-SOE defendant) harmed consumer interests by accessing their privacy files. The defendant Tencent, who at the time held over 80% market share in the Instant Messaging market in China, forced consumers to make a "choose-one-from-two" decision, between taking the plaintiff's antivirus software or Tencent's instant messaging platform. Choosing the defendant's service would cut off a consumer from the plaintiff's antivirus service. As most people in China use Instant Messaging, consumers had little choice but to accept the defendant Tencent's offer. Further, consumers' choices of the defendant's service *en masse* would have the effect of vastly reducing the plaintiff's penetration of the online advertising market, where both players were competitors (because once Qihoo software was removed by consumers from their devices pursuant to the Tencent offer, Qihoo then lost access to them for online advertising purposes). The court nevertheless held that Tencent's strategy was not anti-competitive, holding that Tencent's conduct was a self-protection measure to combat the plaintiff's actions. Tencent was held to have advanced justifiable reasons for its anti-competitive behaviour when its offer effectively obliged customers to delete Qihoo 360's anti-virus software from their devices if they wished to retain access to Tencent's overwhelming popular Instant Messaging service: in essence, for users to retain access to what was at the time China's overwhelmingly popular Instant Messaging service, users had to discontinue using Qihoo 360's antivirus software.[106]

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[104]. Judgment no.4 handed down by the Supreme People's Court of China in 2013 in *Qihoo 360 v Tencent* [*奇虎公司与腾讯公司垄断纠纷上诉案*].

[105]. While not an SOE case, we include it to show that the courts are similarly unsympathetic in AML cases taken against private defendants.

[106]. Guangyao Xu, '互联网产业中双边市场情形下支配地位滥用行为的反垄断法调整: 兼评奇虎诉腾讯案' [Adjustment of Antitrust Law on Abuse of Dominant Position in the Situation of Two-sided Market in the

By contrast in the European Union, such behaviour would most likely be held to constitute abusive leveraging of market dominance from one market into another, which could only be justified if there was an objective justification. Actions such as those performed by Tencent would not be seen as objective in nature under EU competition Art 102. A dominant player could not leverage its dominant position into other markets by such unfair means.[107] Interestingly, SAMR (unlike the courts) has adopted a very different position from the courts in this situation: in 2021 SAMR fined Alibaba (China's equivalent of Amazon) USD $2.8 billion[108] following its December 2020 investigation into Alibaba's "choose-one-from-two" practice which required traders selling products on Alibaba's Tmall.com (Alibaba's business to consumer online shopping platform) to sign restrictive exclusive deals with Alibaba, preventing them from selling their wares on competitors' platforms (such as JD.com, Vipshop, etc.).[109] *China's Anti-Monopoly Guidelines on the Platform Economy* produced by SAMR in 2021 prohibits "choose-one-from-two" practices in the digital platform market, by categorising such practices as constituting an abuse of a dominant position.[110]

4.2 Legitimacy and Effectiveness Concerns in Private Antitrust Enforcement Cases Against SOE's initiated by Citizens (Consumers)

An examination of the accessible private antitrust enforcement cases taken by consumers in China since the AML came into force in 2008 reveals that the number of antitrust cases against SOEs which have held in favour of consumer plaintiffs invoking the AML have been

Internet Industry: Comment on *Qihoo 360 v. Tencent*] (2018) 207 China L. R. 108.

[107] See, e.g., EU Court of Justice judgments: Case C-311/84, *SA Centre Belge d'Études de Marché - Télémarketing (CBEM) v SA Compagnie Luxembourgeois de Télédiffusion (CLT) and SA Information Publicité Benelux (IPB)* ECLI:EU:C:1985:394 where the European Court of Justice held that Luxembourg television could not leverage its dominant position into the advertising market by unfair means. In the digital era, *see* Case T-201/04 *Microsoft v Commission* [2012] ECLI:EU:T:2007:289 where the European Union General Court upheld the European Commission's imposition of large fines against Microsoft for leveraging its dominant position in the PC operating system market into related markets for work group server operating systems and for media players. The Court of Justice confirmed the General Court judgment.

[108] 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 28 号 [SAMR's Decision on Administrative Punishment, No.28 of 2021].

[109] '市场监管总局依法对阿里巴巴集团涉嫌垄断行为立案调查' ['SAMR opens investigations into possible anti-competitive conduct of Alibaba'] (*SAMR*, 24 Dec 2020).

[110] China's Anti-Monopoly Guidelines on the Platform Economy (2021), Art 15(1).

very few in number, merely 3 to date.[111]

4.2.1 Legitimacy Concerns

Let us start first with an extreme example, a consumer case involving one of China's largest SOEs, China Telecom, in *Yang Zhiyong v China Telecom* (2015).[112] This case exhibits antitrust Legitimacy concerns *par excellence.* China Telecom (the defendant SOE) held a 67.8%[113] market share in the Shanghai broadband market in 2013 at the time Mr. Yang (a consumer) alleged abuse of dominant position against the SOE. AML Article 19[114] provides that holding a market share of more than 50% is presumed to be a position of dominance. However, Shanghai High People's Court held that China Telecom did not hold a dominant position in the local broadband market.[115] This is a surprising decision: not only because the explicit terms of AML Article 19 itself presumes an operator holding such a large market share to be the holder of a dominant position. This is somewhat similar to European Union jurisprudence, which holds that a 50%-plus market share held in similar circumstances would be found to confirm a dominant position in the European Union[116], absent

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[111]. From 2008 to present, there have been only 3 cases where the consumer "won": *Wu Zongqu v Yongfu Water (2018); Wu Zongli v Yongfu Water (2018); Wu Xiaoqin v Shaanxi TV (2016)*, all we considered in this Section.

[112]. Judgment no.23 handed down by the Shanghai High People's Court of China in 2015 in *Yang Zhiyong v China Telecom* [*杨志勇与中国电信股份有限公司上海分公司、中国电信股份有限公司滥用市场支配地位纠纷案*]; AML, Art 17(1) provides: "a business operator with a dominant position shall not abuse its dominant position [...] selling commodities at unfairly high prices." Notwithstanding same, low-speed high-priced broadband provision has existed in the Chinese market for years, offered largely by SOE's like China Telecom.

[113]. Shanghai Government, *Shanghai Yearbook 2014* (2015) Ch 21.

[114]. AML, Art 19(1) provides: "Where a business operator is under any of the following circumstances, it shall be assumed to have a dominant market position: (1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market [...]"

[115]. *Yang Zhiyong v China Telecom (2015)* can also be criticized because the court did not define "the relevant market" clearly: the plaintiff, Mr. Yang, claimed China Telecom abused its dominant position in Shanghai; however, the judgment referred to Yang's residential area in Shanghai as the relevant market, when identifying there were competitors in the market who provided similar services at lower prices, as justifying not holding the defendant to be dominant without ever conducting a proper relevant market definition first, or without considering the significance of the fact that the other competitors were all SOEs owned by a common owner, the State, and hence potentially collectively dominant.

[116]. In *United Brands* the Court of Justice of the European Union held United Brands was presumed to hold a dominant position with a market share of between 40-45% in the relevant market, in circumstances where it was highly vertically integrated compared to its nearest competitors; in case *Hoffmann-La Roche* [1979] the Court of Justice held that a market share of 50% or more established a rebuttable presumption of a dominant position in the relevant (vitamins) market; *see also AKZO Chemie BV v Commission*, C-413/14 P *Intel Corporation Inc. v Commission* [2017] ECLI:EU:C:2017:632, etc.. In *Yang*, the court did not consider AML Art 18 which sets out the list of factors which are indicative of dominance. Art 18 sets out the factors which can assist a court or antitrust regulator to make a finding of dominance, including (1) size of an accused operator's

exceptional other circumstances.

By contrast in *Yang* the court held that because several competitors (China Mobile, China Unicom and China Railcom) were providing similar broadband services at lower prices within Yang's residential area, this indicated (in the court's view) a competitive market. This finding in the court's judgment illustrates the antitrust Legitimacy problem: the court was not prepared to look at the substantive reality in the marketplace – all of the so-called competitors were SOE's, and all were under State control (i.e., all had a single common owner, the State), including the defendant. China Telecom held a superior 67.8% market share, with the remaining 32.2% held by the other 3 SOEs between them. Yet the court failed to seriously consider whether China Telecom's superior market position and any other relevant factors could lead to a finding of *dominant position,* nor did the court consider *whether an SOE oligopoly was in operation*.[117]

Yang Zhiyong provides a leading example of how the Judiciary interprets key AML concepts in SOE cases, such as the dominant position concept[118], and the abuse (of dominance) concept.[119] China Telecom was not dominant in the eyes of the court, notwithstanding that (a) it held a 67.8% market share, whereas the other 3 SOEs in the market held far smaller shares; (b) all market participants (including the defendant SOE) had a common owner, the State; and (c) the AML *itself* provided that a player holding more than 50% market share can be assumed dominant.[120] Yet the court did not give substantial consideration to the question of whether the defendant could be dominant, nor did it consider whether any factors negated the defendant's large market share. [121]

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market share; (2) extent to which operator controls raw materials or market access; (3) the operator's financial and technical strengths; (4) the dependence of other market operators on the accused operator; (5) market entry barriers for other operators; and (6) any other relevant factors.

[117]. It cannot be argued that the market was competitive and indeed by the time the Judgment was handed down two years later, the defendant's 67.8% market share (at the time the case was heard, which already dwarfed its fellow SOE competitors market shares) had grown to over 82% in the interim, allowing it to dominate the market even further: Shanghai Government, *Shanghai Yearbook 2016* (2017) Ch 19 showing that China Telecom's market share had increased even further by 2015 to an 82.5% market share when the Judgment was delivered in *Yang*.

[118]. William E. Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16(4) World Trade R. 693, 707-11.

[119]. Xiao Fu and Guofu Tan, 'Abuse of Market Dominance Under China's Anti-Monopoly Law: The Case of Tetra Pak' (2019) 54(2) R. Ind. Organization 409.

[120]. AML, Art 19(1).

[121]. In other words, the court did not proceed to make a finding of dominance notwithstanding the clear indicators of dominance, ignoring the 2012 Supreme Court Judicial Interpretation (Judicial Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts [2012] No. 5 (hereinafter Judicial Interpretation [2012] No. 5), Art 9 of which stated

This illustrates just one of several Legitimacy difficulties facing plaintiffs taking private antitrust enforcement actions against SOEs in China. For example, the problem with the court ignoring the clear terms of the AML dominance test based on market share in such a case, is that it gives rise to a host of other antitrust enforcement Legitimacy concerns. Take for example, where the burden of proof should lie? In *Yang Zhiyong*, the plaintiff had the burden of proving[122] that China Telecom occupied a dominant position. Had the court accepted that dominance was established, the burden of proof *would shift* because the burden of proof of rejecting an abuse allegation shifts *onto the defendant* once dominance has been established.[123] However, this never happened in *Yang Zhiyong* because the court's application of the AML (not making a finding of dominance, contrary to the clear terms of Article 19 AML[124] and not attributing significance to China Telecom's high market share) never allowed the burden of proof to shift onto the defendant (i.e., by not finding the SOE dominant, the defendant SOE was never placed in such a position). Even though the Shanghai Government's Yearbook (an authoritative official source) had already confirmed that China Telecom's market share in the local market was already very high[125], this evidence was not accorded proper weight by the court. Further, Yang also failed because the court (using defective reasoning it is submitted) considered the local broadband market to be a competitive market[126] because of the presence of several competitors, such as China

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that if a public enterprise abuses its dominant position, "the People's Court may on the basis of market structure and competition conditions identify the enterprise's dominant position". Readers should note that although the 2012 Judicial Interpretation was revised in December 2020, the revisions made therein are not relevant to the content of this article: The Supreme People's Court's Amendment Decision Concerning 18 Judicial Interpretations on IP Issues [2020] No.19 (hereinafter The Supreme People's Court's Amendment Decision Concerning 18 Judicial Interpretations on IP Issues [2020] No.19).

[122]. The Civil Procedure Law of China 2017, Art 64, provides: the burden of proof lies on the plaintiff to show that the defendant occupies a dominant position; *see also* Jingmeng Cai, 'Private Antitrust Enforcement of Resale Price Maintenance in China: What Lessons Can China Learn from the United States' (2017) 18 Asian-Pacific L. & Pol'y J. 2, 13.

[123]. As per Art 8 of the Judicial Interpretation [2012] No.5: "[...] The defendant shall bear the burden of proof if it offers the defense that the conduct [abuse of dominant position] is justifiable." *See also* Xiaoye Wang, Jessica Su & Wei Han, *Competition Law in China* (2018) Ch 5; Sébastien J Evrard, 'Civil Antitrust Litigation in China' (2016) May Int'l Bar Asso.

[124]. AML, Art 19(1) provides: an enterprise holding a 50% market share is assumed to occupy a dominant position. China Telecom held a 67% market share at the time the case was heard.

[125]. *Shanghai Yearbook* (n 112).

[126]. *Yang Zhiyong v China Telecom (2015)* the Court stated: "causing the effect of severely harming competition in the market is a necessary precondition for anti-monopoly intervention against market conduct" [产生严重损害市场竞争效果是对市场行为进行反垄断干预的必要前提]. This statement demonstrates that the court did not understand how to apply the AML: because there were competitors in the market, *ipso facto*, the court held the market was competitive, when in fact it should have asked, is there a dominant player, and if so, then

Unicom and China Mobile, but failed to consider whether China Telecom was nevertheless unilaterally dominant (or whether some form of collective dominance existed), particularly given all of the competitor SOEs had a single common owner, i.e., the State.

This failure to apply the dominance test comprehensively presents an excellent example about the difficulties litigants face when attempting to allege breaches of the AML against SOEs, because judicial application (or non-application) of the AML's competition criteria results in such strange outcomes. This highlights the AML antitrust Legitimacy concern evident in the Judiciary's approach.

4.2.2 Effectiveness Concerns

Effectiveness concerns can be seen in private antitrust cases taken in China by consumers against SOEs in the failure of the courts to award adequate compensation and legal costs for breaches of the AML by SOEs. This weak protection afforded by the courts to consumers in antitrust cases against SOEs by the courts in China raises major AML Effectiveness concerns, exacerbated by the combination of very low success rates[127] and low compensation awards (compensation being confined to merely recovery of actual loss caused by the offending practice directly, and case preparation costs, as per the 2012 Judicial Interpretation of the AML by the Supreme People's Court[128]). No awards of damages have been made (beyond direct loss), and awards of legal costs to "successful" plaintiffs are only made at the discretion of the court and are not the order of the day. Antitrust Effectiveness concerns in this context are probably best illustrated by China not adopting a full-compensation approach in antitrust actions *per se*.[129] This differs markedly from the EU[130] and US[131]

considered whether the defendant's actions constituted an abuse of dominance.

[127]. From 2008 to present, less than 1% of Judgments in private antitrust enforcement cases have been held in favor of plaintiffs in China: Xue and others (n 29).

[128]. Judicial Interpretation [2012] No. 5, Art 14:

> Article 14: Based on the claims of the plaintiff and the proven facts, the People's Court shall order the defendant to cease the infringing action, to pay losses, or to undertake other civil responsibilities, provided that the monopolistic conduct of the defendant existed and has caused losses to the plaintiff.
> Upon the request of the plaintiff, the People's Court may include reasonable expenses paid by the plaintiff for investigation and prohibition of monopolistic conduct, in the compensation for damages.

[129]. Žygimantas Juška, 'The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation' (2018) 49 Int'l R. Intellectual Property & Competition L. 63, 64 providing ineffective damages actions can result in huge losses for victims; on the situation in China more specifically,

approaches, and immediately raises AML Effectiveness and further AML Legitimacy concerns. While a recent development may herald a change, with the publication of the October 2021 Bill to amend the Anti-Monopoly Law[132] Article 60 of which providing that where the AML is infringed, then the defendant should be obliged by the court to: (a) cease the infringement; (b) restore the plaintiff to the position they were in prior to the infringement; and (c) compensate the plaintiff for harm suffered. Only time will tell if this Article remains in the Bill when enacted, and whether the courts will apply it in full. Whether it shall herald change remains to be seen, given the courts traditional reluctance to make antitrust infringement findings against SOEs to date.

4.2.2.1 *Shaanxi TV* and *Yongfu Water* Cases

Turning now to the only three successful consumer-led private antitrust judgments handed down against SOEs in China to date, Effectiveness concerns can be identified to the fore. The first case was *Wu Xiaoqin v Shaanxi TV (2016, Supreme People's Court),* where Shaanxi TV (SOE, the only TV service operator in the local market) was held to have abused its dominant position[133] by forcing consumer Mr. Wu to pay for services he did not require.[134] Even though Wu had no desire to watch any digital television, Shaanxi TV still charged Wu RMB 15 (USD $2.2) per billing period. Wu initiated legal action against Shaanxi TV before

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see Alexandr Svetlicinii, 'Private Litigation Under China's Anti-Monopoly Law: Empirical Evidence and Procedural Developments' (2017) 7 KLRI J. L. & Leg. 163, 190 where "damages claimed" and "damages awarded" in the few plaintiff-winning cases were compared. To update that analysis, as of the time of writing: (1) one plaintiff enterprise was awarded **no compensation**, *see Lou Binglin v Beijing Aquatic Products Wholesale Industry Association (2013)*; (2) two plaintiff enterprises were awarded lower than what they claimed: one plaintiff was awarded RMB 2m **actual losses only** (approx. USD $310,000), *see Healthcare Co., Ltd. v TDI (2018)* at first instance, and the other plaintiff was awarded **0.37%** of the claimed damages *see Rui Bang v Johnson & Johnson (2012)*; (3) two consumer plaintiffs were awarded **actual losses and 1/5 of claimed legal costs**, *see Wu Zongqu v Yongfu Water (2018)*; *Wu Zongli v Yongfu Water (2018)*; (4) three plaintiffs were awarded what they claimed: one consumer plaintiff was awarded **actual losses without claiming any legal costs**, *see Wu Xiaoqin v Shaanxi TV (2016)*, and the other two (enterprise) plaintiffs were awarded **actual losses and claimed legal costs**, *see Huawei v IDC (2013)*; *Yangtze River Pharmaceutical Group (2019)*.

[130]. Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition provisions of the Member states of the European Union [OJ L 349/01] (5.12.2014) (hereafter called the "Antitrust Damages Directive"), Art 3(2). In European Union private antitrust actions, "full compensation" means awards to cover loss, profits and interest.

[131]. The Clayton Act 1914, Oct 15, 1914 730: L 63-212, codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53: Sec 15(a) provides for the award of triple damages.

[132] Amendments to Anti-Monopoly Law of China, Art 60.

[133]. *Wu Xiaoqin v Shaanxi TV (2016)*.

[134]. *id.* This case was appealed to the Shaanxi High People's Court, and thereafter to the Supreme People's Court, which affirmed the original Judgment.

Xi'an's Intermediate People's Court, complaining that he was being forced to pay for a service he did not require, i.e., that he was subjected to anti-competitive behaviour. A favourable finding, based on infringement of AML Art 17(5) ("A business operator with a dominant position shall not abuse its dominant market position to conduct the following acts: [...] (5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause [...]") was made by the court in Xi'an in favor of the plaintiff Wu, who was awarded RMB 15 compensation based on his actual loss. Although the plaintiff was awarded his actual loss for 3 months digital television fees, namely the princely sum of RMB 15[135], there was no award of damages beyond his actual loss, nor recognition of the plaintiff's time and effort spent preparing the case during 4-year trial process.[136] Such an inadequate remedy calls the Effectiveness of the remedy for breach of the AML into question.

In the other two successful consumer-led antitrust infringement actions against SOEs, Yongfu Water, *Wu Zongqu v Yongfu Water (2018)*[137] and *Wu Zongli v Yongfu Water (2018)*[138], Mr. Wu Zongqu and Mr. Wu Zongli, separate plaintiffs in the two cases respectively, were new customers of Yongfu Water in Guilin city in southern China. Both sued Yongfu Water (the only water supplier in their residential area), alleging abuse of dominant position[139] contrary to AML Article 17 by charging them unfairly high prices for water meter installation services when connecting them to the public water supply. Although the plaintiffs won their cases and were awarded their actual losses (i.e., reimbursement of the cost of water meters and payment for installation services) plus 6% interest on the actual losses, they were awarded only one fifth of their legal costs, respectively, which again raises Effectiveness concerns. The successful plaintiffs in these two cases claimed RMB 5,000 (approximately USD $760) respectively towards their case preparation costs but were awarded only RMB 1,000 (approximately USD $152) by the court respectively, without any explanation of how it reached that adjudication.

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[135]. *id.* Equivalent to roughly about USD $2.20. Shaanxi TV.

[136]. For example no award was to made to reimburse the plaintiff's lawyer's fees, nor the plaintiff's travel expenses for travelling to the appeal hearing before the Supreme Court in Beijing, over 550 miles from his home city of Shaanxi, nor for reimbursing him for lost annual leave taken to travel for the hearing.

[137]. *Wu Zongqu v Yongfu Water (2018, Guangxi Autonomous Region Higher People's Court)*.

[138]. *Wu Zongli v Yongfu Water (2018, Guangxi Autonomous Region Higher People's Court)*.

[139]. AML, Art 17(1) provides: "a business operator with a dominant position shall not abuse its dominant position […] selling commodities at unfairly high prices."

The recently published Bill to amend the Anti-Monopoly Law[140] Article 60 provides that where the AML is infringed, then the defendant should be obliged by the court to: (a) cease the infringement; (b) restore the plaintiff to the position they were in prior to the infringement; and (c) compensate the plaintiff for harm suffered. Only time will tell if this Article will improve the lot of private antitrust litigants.

4.2.3 Legitimacy and Effectiveness Observations in Consumer-Led Antitrust Enforcement Actions

What the cases considered in this section above demonstrate in *consumer versus SOE* antitrust cases is that the consumer faces both antitrust Legitimacy and Effectiveness obstacles when appearing before the judiciary to litigate their antitrust cases against AML-infringing SOEs. First, as we saw in *Yang Zhiyong v China Telecom* case, the court cannot be said to have rigorously applied the AML dominance test, thereby creating antitrust Legitimacy issues, which led to misapplication of the dominance test to the detriment of the plaintiff, in circumstances where a clearly dominant position existed.

Furthermore, as we saw in the *Shaanxi TV* and *Yongfu Water* cases, antitrust Effectiveness issues arise when the court confines awards to successful plaintiffs to actual loss only, with no award made for damages, and with only partial legal (or other case preparation) costs awarded. This approach by the Judiciary raises Effectiveness concerns because the court is not giving full effect to the remedies provided for breach of the AML. It remains to be seen whether the expected enactment of Article 60 of the 2021 Bill will lead the courts to recognize that more than mere losses could be awarded in successful AML infringement cases, i.e., damages could be awarded plus costs. Until this change comes about, these rare successful consumer-led antitrust cases against SOEs demonstrate that the courts are not making awards of damages nor awards of full legal and case preparation costs when successful cases come before the court. Thus it is submitted that the courts in China are neither respecting the Legitimacy of the AML, nor giving proper Effectiveness to AML remedies in successful cases. In those rare instances where consumers have succeeded (i.e., the *Shaanxi TV* and *Yongfu Water* cases as set out above), the court has confined

[140] Amendments to Anti-Monopoly Law of China, Art 60 (October 2021, expected to be enacted into Law sometime in 2022).

awards to merely the award of the litigants' actual loss (and interest on the actual loss as per the *Yongfu Water* cases), along with either no, or only partial, recovery of legal costs.

On the matter of *the recovery of costs in such successful antitrust cases*, the Judicial Interpretation of the AML's Article 14 (2012) leaves the window open for courts to award plaintiffs' legal costs, yet costs are rarely granted, and where they are, usually it is only a fraction of what the litigant claims.[141] While it could be argued that each side should bear their own legal or case preparation costs in civil cases in a Civil Law system, it is submitted that this should not apply in successful private antitrust enforcement cases because it takes huge effort to prepare an antitrust case, and that is why the usual practice that each side bears their own legal costs should not be followed in antitrust cases.[142] Indeed, the notion that the successful party's costs could be borne by the AML infringement losing party has not been excluded in China's civil litigation system because the Judicial Interpretation of the AML (Article 14) appears to allow for recovery of legal costs, though admittedly at the court's discretion.[143]

For these reasons set out above, we conclude that the Effectiveness of the AML is being obstructed by judicial decisions in private antitrust cases taken against SOEs, at both the damages award level and also in the practice of not awarding adequate recovery of legal /

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[141]. *See* the (two successful) *Yongfu Water* cases discussed above, where only one fifth of the legal costs claimed was awarded by the court, on the basis that the court took the view that such sum was "reasonable" (*see id*). No legal costs were awarded in the only other successful consumer-led private antitrust enforcement case, *Shaanxi TV,* because the plaintiff did not seek the award of costs. Requesting costs is the obligation of the plaintiff and is awardable only at the discretion of the court.

[142]. Note that when the antitrust suit enforcement defendant is another private enterprise, rather than an SOE, then the courts may be sometimes prepared to award full claimed legal costs in antitrust cases: for a rare example of a successful private antitrust enforcement case, where claimed costs were also awarded, *see Huawei v IDC* (2013) where the successful plaintiff was awarded actual losses *and* (unusually) its full claimed legal costs as well, though note in this instance the defendant was not an SOE, rather it was a private foreign owned enterprise. A rare instance where the court awarded full claimed legal costs against a domestic enterprise can be seen in the recent judgment (*Yangtze River Pharmaceutical Group Guangzhou Hairui Pharmaceutical Co., Ltd., Yangzijiang Pharmaceutical Group Co., Ltd. v Hefei Medical Co., Ltd., Hefei Enruit Pharmaceutical Co., Ltd. and Nanjing Haichen Pharmaceutical Co., Ltd. (2019)*) where the judgment awarded full claimed legal costs, in addition to claimed actual losses. Indeed this notion that costs can be awarded in favour of the plaintiff is not alien to the China's Civil Law system as the idea has already been taken up somewhat in the related area of *unfair competition*: Art 17 of the Law of China Against Unfair Competition 2019, provides: "A business causing any damage to another person in violation of this Law shall assume civil liability according to the law [...] (3) [...] The amount of compensation shall also include reasonable disbursements made by the business to prevent the infringement."

[143]. Although the 2012 Judicial Interpretation of the AML (revised in 2020) appears to allow legal costs to be recovered, it could be argued that the wording is somewhat uncertain. The certainty of the losing party paying the winning party's legal costs in antitrust enforcement cases should be expressly re-confirmed by law and this Legitimacy problem could be fixed by amending the Judicial Interpretation of the AML with appropriately clear wording.

case preparation costs to reflect the costs of antitrust case preparation and pleading before the courts. Without reform of judicial practice in this area, consumer litigants will, just as we saw earlier above with enterprises who litigate against SOEs[144], find themselves with very low chances of success in antitrust enforcement actions; and even where successful, consumer litigants will be greeted by an absence of compensatory damages awards (beyond recovery of small monetary losses), and also find that case costs recovery allowed by the courts are similarly entirely inadequate.

5. JUDICIAL RELUCTANCE TO LOOK AT SOE OWNERSHIP STRUCTURES WHEN DECIDING WHETHER MARKETS ARE COMPETITIVE: THE SINGLE ENTITY CONCEPT AND THE CONCEPT OF COLLECTIVE DOMINANCE

Judicial failure to look at SOE ownership structures in private antitrust enforcement cases illustrates another example of how the Judiciary perceives the AML's antitrust prohibitions lack Legitimacy. We already saw above (in the 2015 case of *Yang Zhiyong)* how inadequate application or superficial consideration by the Judiciary of key AML concepts, such as the dominant position concept[145], and the abuse (of dominance) concept[146], led to non-application of the AML. The obviously dominant position of China Telecom was not recognised by the court (despite the SOE holding a 67% market share); and neither did the court consider whether the SOE and its other three competitors in the market, all SOE's, could possibly be held to occupy a collective position[147] either. This is particularly noteworthy when one considers that *all 4-market participants had a single common owner*,

144. *See* Section 4.1 above.
145. Kovacic (n 118).
146. Fu and Tan (n 119).
147. There is no collective dominance test explicitly provided for in the AML, but as we shall argue in this section of the article, such a test is clearly needed in the AML (to provide legal certainty) in order to control abuses of dominance by SOEs whose collective market shares allow them to effectively occupy a position of joint dominance in the market. Notwithstanding the AML does not explicitly provide a collective dominance test, in 2020, for the first time, SAMR held in 国家市场监督管理总局行政处罚决定书 2020 年第 8 号 [SAMR *Calcium Gluconate* Decision (2020) No. 8] (14 Apr 2020) <www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314227.html> that 3 non-SOEs injectable calcium gluconate suppliers occupied a collective dominant position with a combined market share with over 80%. What is interesting about this decision is that SAMR did not base the decision on AML Art 19 (which provides that where 3 companies occupy more than 75% of market share, they are dominant), but instead, based its decision on AML Art 18 which does not expressly refer to dominance involving multiple enterprises. Art 18 sets out the factors which can assist a court or antitrust regulator to make a finding of dominance (n 116). A simple amendment should be made to the AML to create legal certainty that the list of factors set out in Art 18 which are indicative of dominance, can also include determination of collective dominance.

the State. Yet despite China Telecom and these 3 competitors holding 100% of the Shanghai broadband market between them, with all sharing a common owner, no such finding was made, or even attempted by the court.

In order to ameliorate these concerns, it is submitted that the application of the 'single economic entity' theory, similar to that employed in EU antitrust jurisprudence[148], would have solved the problem that the courts experience in cases such as this, and thereby reposition the AML into a hierarchical primacy position in China's legal framework in this context.[149] Major antitrust regimes employ this approach: for example, the EU[150] and the US[151] recognise the necessity for the single economic entity concept in their antitrust

[148]. European Union antitrust law employs a similar concept, commonly referred to as "single economic unit" which implies that where a parent enterprise and a subsidiary enterprise enter into an apparently anti-competitive agreement, it not a violation of Art 101 TFEU because both entities are regarded as a single economic unit because they are not independent competitors with each other, because one has decisive influence over the other, e.g., common board members, control over commercial strategy, etc.. However, common ownership could lead to the situation where a parent enterprise, when deemed to hold decisive influence over the behaviour of a subsidiary, can be penalized for anti-competitive agreements entered into with others by the subsidiary, *see* C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECLI:EU:C:2009:536; Case T-419/14 *Goldman Sachs Group v Commission* [2018] ECLI:EU:T:2018:445. The single economic entity concept is also employed in European Union Merger Control Law in another context namely, where a parent company holds decisive influence over a subsidiary, then the turnover of both entities is aggregated together for the purpose of calculating merger control financial threshold rules because both entities are regarded as being part of a single economic unit by virtue of one having decisive influence over the other.

[149]. Angela HY Zhang, 'The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises?' (2012) 4 The Antitrust Bulletin 805, 810; *see also* (n 150) listed European Union cases on the single economic entity theory.

[150]. In European Union antitrust regime, single economic entity theory is accepted, i.e., the European Commission and European Union Courts will regard entities with a common ownership structure as being a single economic entity provided that the common ownership's particular features enable the controlling enterprise(s) exercise decisive influence over the subsidiaries, e.g., C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECLI:EU:C:2009:536; Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Others v Commission* [2012] ECLI:EU:C:2012:479, and in such circumstance, the parent can be jointly and severally liable for the anti-competitive activities of the entity it has decisive influence over: *see* Case T-419/14 *Goldman Sachs Group v Commission* [2018] ECLI:EU:T:2018:445.

[151]. The US Supreme Court has also pronounced on single entity doctrine, for example, in *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752 the US Supreme Court held that a single entity could be deemed to have arisen where a subsidiary is wholly controlled by a parent: their unity of purpose means that they cannot be regarded as independent competitors for the purpose of §1 of the Sherman Act. However, in *American Needle Inc. v. National Football League* (2010) 560 U.S. 183, unlike the EU approach, the Supreme Court left open the possibility that anti-competitive arrangements between different entities (otherwise deemed to constitute a single economic entity) could nevertheless be held to be parties to an anti-competitive arrangement, contrary to the Sherman Act, if functionally, they pursued their own independent economic interests: so, in effect, the Court was disregarding legal form in preference for substantive functionality. Therefore, if a controlling enterprise and an enterprise under its control (whether legally as in the case of a subsidiary, or functionally controlled by some other means) enter into an anti-competitive agreement that affects business operations in the relevant market, it is *per se* a violation of §1 of the Sherman Act unless it qualifies for an exemption under the *Rule of Reason* (e.g., interest-sharing in making the football league successful and profitable). This is somewhat different from the European Union approach (described above in n 148).

regimes. The authors submit that the single entity concept could be used by China's courts in antitrust cases to ascertain whether SOEs occupy a joint dominant position in markets heavily (or indeed exclusively) populated by SOEs (because they have a common ownership structure), particularly when SOEs provide similar services in the same sector under a common ownership structure: e.g., China Telecom, China Unicom and China Mobile, all are competitors, yet all at the time of *Yang Zhiyong* had a single common owner, the State. They cannot be regarded as independent competitors of China Telecom, when a common owner, the State, continues to exercise decisive influence over all of them. Therefore, it is submitted that the notion of "single economic entity", known to European Union / US Law, and previously known in China itself[152], could be introduced by SAMR into the China AML reform context, in order to prompt the courts to address the single economic entity question and thereby remove the current fiction that there is competition in markets populated chiefly by several SOE participants who are all under common ownership.[153] Such an approach could remove antitrust Legitimacy and Effectiveness concerns which arise when the courts find that markets are competitive even though the main market participants are SOEs, sharing a common owner. However, the current 2021 AML revision Bill does not include any such reform provision.

This need to address this single economic entity gap in the AML becomes all the more pressing in light of the so-called "Mixed-Ownership Reform" policy in 2013, which sought to allow private investors to invest in SOEs.[154] This results in a most interesting dilemma for China's Judiciary: will such mixed investment enterprises, comprising of a mixture of State and private capital, be regarded as single economic entities in similar fashion to SOEs 100% owned by the State[155] where it appears nevertheless that such mixed-ownership SOEs, along with 100% State-owned SOEs, are acting as one in oligopoly-like fashion? In this environment, the availability of the single economic entity concept in the AML becomes all the more pressing.

So for example, China Unicom, one of the competitors in the *Yang Zhiyong* case (which held a far smaller market share than the dominant player, China Telecom), underwent

[152]. The single economic entity theory which was accepted in the 1980s in China, is no longer in favour. *See* Luyao Che, *China's State-Directed Economy and the International Order* (Springer 2019) 50.
[153] e.g., as was seen in *Yang Zhiyong v China Telecom (2015)*.
[154]. *See* (n 42; n 53) and accompany text (the initiation of the Mixed-Ownership Reform).
[155]. 100% State-owned connotes an SOE in which no private funds have yet been invested.

Mixed-Ownership investment in 2017[156], subsequent to Yang's case. This formerly (traditional) telecom SOE, which previously had only one shareholder, the State, now has private shareholders and other SOE shareholders, with China Unicom having retained a 36.7% stake in itself.[157] This would make it hard to define China Unicom as a 100% State-owned SOE anymore, so the question arises, would it now be held to be part of a single economic entity along with other 100% State-owned telecom SOEs still solely owned by the State? It is submitted that it would, because in fact it still remains under State control despite the influx of private investment, because other SOEs will also have acquired significant minority shareholdings in China Unicom, which cumulatively will still ensure that the State retains control, notwithstanding the introduction of some private shareholdings as well.[158] In other words, the State is still, albeit indirectly, holding decisive influence over China Unicom via China Unicom's 36.7% shareholding *and* the other shareholdings in China Unicom held by *other SOEs*. So for example, if the *Yang* case arose today since the Mixed-Ownership Reforms have taken place, while it is conceivable that some of China Telecom's (formerly) SOE Competitors (such as China Unicom) might henceforth be regarded as a mixture of public and private investments holdings, this would not preclude all such entities from still being held to be subject to one common owner or controller, i.e., the State. In turn, this would open the way open for a court to reach a finding that the participants are a single economic entity (with a correspondingly cumulatively large market share) and hence allow the court examine whether such entities collectively constitute a single dominant economic entity.

The Judiciary needs to be alert to this Mixed-Ownership phenomenon when assessing dominance, i.e., that despite former SOEs appearing to have taken in private investment shareholders, they must still consider whether the mixed-ownership entities nevertheless remain within the State's controlling influence, which they undoubtedly do according to

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156. Jiao Likun, '六问联通混改' [Six Questions of China Unicom's Mixed-Ownership Reform] *Morning Post, China* (21 Aug 2017) B2.

157. '2017 Corporate Social Responsibility Report' *China Unicom* (1 July 2018) 7.

158. State investment in China Unicom following the influx of private investment under the Mixed-Ownership Reforms dropped to approximately 53% of the total shareholding, with China Life Insurance (another SOE) one of the new China Unicom's minority shareholders (36.7%), so the State remains in control by virtue of the combination of its retained 53% minority shareholding and China Life Insurance's minority shareholding: *see* Sarah Y Tong and Xiangru Yin, 'Mixed Ownership Reforms of China's State-owned Enterprises' (2019) 11 East Asian Pol'y 104.

official sources.[159] Hence the Judiciary needs to be alive to the single economic entity theory being applied not just to purely State-owned SOEs, but also now to SOEs who have received investment of private funds under the Mixed-Ownership Reform policy.

Interestingly, the European Union has recently applied the single entity theory to a Chinese SOE, CGN (China General Nuclear PowerCorporation) in the EU merger regulation context, by holding that CGN was part of a single economic entity along with other China SOEs (for the purpose of satisfying jurisdictional financial turnover thresholds under the European Union Merger Regulation) on the basis that the China SOE's had a common owner, the China State.[160]

Finally there is the question of collective dominance to be considered. There is legal uncertainty about whether the AML provides a legal basis for the courts to make a finding of collective dominance. In this respect, although AML Art 19 provides that market shares confer dominance as follows: 50% one enterprise; or 66.67% market share held among two undertakings; or 75% market share held between three enterprises, with, in the case of the latter two categories, each enterprise holding at least a minimum 10% market share, however, Art 19 does not explicitly provide a test for establishing collective dominance.[161] Of course, were private investment to be so significant that an SOE was no longer under State control, on account of taking as substantial private investment, that could allow the possibility that such a privately controlled (former SOE) entity would be part of an oligopoly along with other 100% State-owned SOEs or other mixed ownership SOEs still remaining

[159]. 国务院关于国有企业发展混合所有制经济的意见 [Opinions of the State Council on the Development of Mixed-ownership Reform in SOEs] (2015) clearly states the insistence of State intervention (i.e., control) –政府引导, 市场运作 [government orientation and market operation]; *see also* Ann Listerud, 'MOR [Mixed-Ownership Reform] Money MOR Problems: China's Mixed-Ownership Reforms in Practice' *South China Morning Post* (1 Oct 2019); Milhaupt and Zheng (n 42).

[160]. In the EDF/CGN/NNB (European Commission Decision M.7850 – *EDF/CGN/NNB Group of Companies* (10 Mar. 2016). In this case EDF (Electricité de France S.A.) and CGN (China General Nuclear Power Corporation) sought to acquire joint control over NNB, a newly built nuclear power plant respectively at Hinkley Point, Sizewell and Bradwell, UK. CGN (a Chinese company active in the development, construction and operation of nuclear power plants and renewable energy plants) did not meet the Merger Regulation financial turnover thresholds by itself. However the European Commission nevertheless found that CGN did meet the financial turnover thresholds because it regarded CGN as being part of a greater single economic entity, namely the central Government SASAC which controls many other SOEs like CGN (90% of CGN was owned by the central SASAC, the State controlled State-Owned Assets Supervision and Administration Commission of the State Council). Accordingly, the European Commission identified multiple SOEs (owned by CGN's parent) to collectively form a single economic unit, because they, like CGN, were controlled by SASAC.

[161]. Notwithstanding same, in 2020 in the *Calcium Gluconate* Decision, SAMR purported to make a finding of collective dominance based on Art 18 AML.

under State control, and so their behaviour could continue to subjected to antitrust review under a collective dominance test. This is a matter which should be given serious consideration for inclusion in the AML Amendment Bill 2021, although to date, no such test has made its way in to the late 2021 Bill version at the time of writing.

If the court regarded the Mixed-Ownership SOEs as independent entities, it could still be open to the court to find that they either had entered into anti-competitive agreements with SOEs, prohibited by the AML (e.g., market sharing), or alternatively consideration could be given to where they occupied *a collectively dominant position*. EU antitrust jurisprudence has developed the concept of collective dominance, which arises where there are certain structural links and mechanisms (including deterrent mechanisms) that allow independent competitors to foresee the commercial behaviour of the other(s), such that in such circumstances, the collaborating competitors can be found to be "collectively dominant".[162]

6. PROPOSALS TO SENSITIZE THE JUDICIARY TO EFFECTIVENESS AND LEGITIMACY CONCERNS IN AML ENFORCEMENT CASES

6.1 Elevation of Antitrust Legitimacy and Effectiveness via SAMR Liaison with the Judiciary

The following action is proposed to help the judiciary to overcome their AML Effectiveness and Legitimacy blindspots. Given the fact that judges in antitrust actions may have very limited (or even no) prior career experience dealing with antitrust issues, it is submitted that cooperation between the People's Courts and SAMR would be helpful for the judiciary hearing cases requiring AML application and interpretation before judgments on private antitrust enforcement cases are finalized and handed down. This is not as gargantuan a leap as it sounds: the right to invite specialists with relevant knowledge to give expert evidence before the court on complex antitrust issues has already been granted to litigants by the Supreme People's Court *Judicial Interpretation on Several Issues Concerning the Application*

[162]. Case T-342/99 *Airtours plc v Commission* ECLI:EU:T:2002:146. *See* further in European Union case law: e.g., European Commission Decision M.7932 *Dow/DuPont* (27 Mar. 2017); European Commission Decision M.8084 *Bayer/Monsanto* (21 Mar. 2018). See also US case law: e.g., *U.S. v Philadelphia Nat'l Bank* (1963) 374 U.S. 321; *U.S. v. E.I. DuPont de Nemours & Co.* (1957) 353 U.S. 586. *See also* Einer Elhauge, 'Horizontal Shareholding' (2016) 129 Harv. L. R. 1267; José Azar, Martin C. Schmalz and Isabel Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73(4) J. Fin. 1513; Alec J. Burnside and Adam Kidane, 'Common Ownership: An EU Perspective' (2020) 8(3) J. Antitrust Enforcement 456.

of Law in Hearing Civil Cases Caused by Monopolistic Conducts since 2012 (revised in 2020).[163]

This right of parties to invite specialists to address the court should be extended to the judges as well. This is because specialists, such as SAMR staff members, especially those who work in the National Anti-Monopoly Agency (under the supervision of the SAMR) are knowledgeable on antitrust matters. Therefore, seeking expert advice *on the implementation and application of the AML* would equip judges with a better understanding of the need for the AML's primacy (i.e., its Legitimacy) and Effectiveness to be respected. This would not be a uniquely Chinese phenomenon: there are already such features present in older antitrust systems, such as is found (for example) in the European Union, whereby the European Commission can make interventions not only in antitrust cases before the European Union's own courts in Luxembourg, but it also has the right to make interventions before EU Member States national courts hearing disputes involving European Union competition issues under the modernized decentralized competition law enforcement process, established in 2004.[164]

6.2 A Role for SAMR in Judicial Training

Another proposal to combat the Judiciary's currently low priority accorded to the AML's Effectiveness and Legitimacy, and which will probably have a decent chance of success, would be a campaign by SAMR to embark on an intensive program to educate the Judges

[163]. Judicial Interpretation [2012] No. 5, Art 12 provides: "Parties shall apply to the People's Court to have one or two specialists with relevant knowledge appear in court to provide explanations on specialty issues about the case". Expert witnesses are already heard in antitrust cases between competing private enterprises: *Qihoo 360 v Tencent (2013)* expert witnesses offered expert competition testimony before the court on behalf of the plaintiff; expert competition law witnesses have also appeared in a case involving a software supplier and a Government agency in Judgment no.228 handed down by the Guangdong High People's Court in 2015 in *Shenzhen Siweier Technology Ltd. v Guangdong Department of Education* [*斯维尔公司诉广东省教育厅侵犯公平竞争权案*] (2015), which decided the first successful AML case against a Government agency in China, with specialists in administrative law and competition law appearing before the court as expert witnesses.

[164]. For example, Art 15 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 (former Articles 81 and 82) of the Treaty [2003] OJ L1/1, provides that the European Commission may, with the permission of the national court, appear before the national court and give its view on European Union antitrust law's interpretation where a case before the national court raises such issues. Also the Regulation obliges national competition authorities and the Commission to cooperate closely with each other to ensure the uniform application of European Union competition law across the Member States: *see generally* Dermot Cahill (ed), *The Modernisation of EC Competition Enforcement in the European Union* (CUP 2004).

and major administrative agencies as to the primacy of the AML over industrial policy and SOE's interests. Training and instruction could be provided to the Judiciary on how the AML's application can be used to curtail abusive or collusive behaviour by dominant SOEs or major private corporations appearing before China's courts.

Also, giving the judges some exposure to how the European Commission assists European Union and national courts (when those courts are called upon to address complex European Union antitrust issues) could be illuminating. These soft steps might be more successful for addressing AML Legitimacy concerns than hard legislation, which the judges might otherwise continue to de-emphasise, just as they have done with the AML to date. Consumers and SME's falling victim to dominant SOE's or to collusive players' abusive or collusive behaviour, deserve fair consideration when they seek Effective remedies and enforcement pathways, which the AML intends them to have. This AML Legitimacy and Effectiveness concern will only change when SOE's defending AML antitrust actions find in the Judiciary a newfound regard for the principles of the AML.[165]

6.3 The People's Supreme Court to restate its 2012 AML Judicial Interpretation of the AML[166]

The 2012 Judicial Interpretation should be restated to emphasize that (a) it is open to lower courts to award damages in AML cases beyond ordering mere recovery of direct loss, and (b) successful applicants full legal costs should be recoverable in successful private antitrust enforcement cases as a matter of course, given the extensive effort required for antitrust case preparation and pleading. The use of expert witnesses should also be welcomed to assist the court[167], and the courts should be reminded that if they do not make correct findings under the dominance test, then the opportunity to shift the burden of proof onto the defendants (to rebut presumption of abusive conduct) cannot arise.[168] The Supreme Court should also reaffirm that the AML antitrust prohibitions apply to SOEs.

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[165]. *See* Section 4 where this was considered.
[166]. Judicial Interpretation [2012] No. 5.
[167]. Ma (n 20) 201-25 pointing out that emphasizing the role of expert witnesses in antitrust lawsuits could enhance private antitrust enforcement.
[168]. *See* Section 4.2.2.

6.4 The SAMR Fair Competition Review System

The Fair Competition Review system proposed by SAMR (and its predecessor agencies) as a means of ensuring that State agencies and their economic development proposals are subjected to prior Fair Competition Review in order to ensure that they are competition-neutral, now features in the 2021 Bill to revise the Anti-Monopoly Law, though the Bill's terms are less than explicit as to how comprehensive the Fair Competition Review coverage system will be. It is not made sufficiently explicit in the Bill that Fair Competition Review should cover *all levels* of Government industrial policy in order to achieve competitive neutrality. That the fair competition review system should apply to all State bodies should be addressed in more detail in the 2021 Bill prior to its enactment, to make it clear that Fair Competition Review should apply to *all* administrative bodies and agencies at *all levels*, including high State-level bodies to ensure that non-competition neutral intervention by State level bodies and agencies ceases in the marketplace. This should, in turn, encourage the Judiciary to avoid judicial deference to industrial policy considerations when AML enforcement actions against SOEs come before the courts. This would help solve the lack-of-AML-primacy concern that SAMR has expressed in its 2020 proposals, where it is rightly concerned with the AML not being accorded primacy over industrial policy.[169]

7. CONCLUSIONS AND FINAL OBSERVATIONS

To overcome the current Legitimacy and Effectiveness problems identified in the Judiciary's approach in private antitrust enforcement cases taken against SOEs, the authors have suggested proposals for reform[170] above which, if implemented, will go some way towards helping change the judicial mindset towards antitrust Legitimacy and Effectiveness. These reform proposals are aimed at improving the AML's Legitimacy among the judiciary, and seek to bring about a corresponding improvement in its Effectiveness in the private antitrust enforcement context.

Arising from the analysis of the case law, the authors assert that although the AML formalistically prohibits market players, including SOEs, from infringing the AML[171], in reality

[169]. *See* Section 3.3.
[170]. Summarized herein and set out in more detail in Section 6.
[171]. AML, Arts 7 & 31.

SOEs enjoy a *de facto* exemption from the application of the AML in private antitrust actions.[172] This observation is evident from the case law, which repeatedly demonstrates that the judicial authorities rarely make a finding of dominance, instead taking the view that if markets have multiple competitors, then there can be no dominance. Furthermore the courts have not applied the AML price-fixing and minimum-pricing provisions appropriately, in situations where, to any independent observer, SOE's have clearly dominated the market, and engaged in anti-competitive behaviour, yet no breach was found by the courts, except in a tiny number of cases.[173] This phenomenon raises major Legitimacy and Effectiveness concerns about the AML, and reflects traditional political and regulatory deference to the interests of SOEs by regulatory authorities in China, of which the courts are a key part.[174]

While SAMR's 2020 AML reform proposals (and the resultant 2021 Amendment Bill) to deal with the lack of primacy currently accorded to the AML appear, at first glance, to herald significant reform, upon closer scrutiny it becomes evident that these measures will not achieve the desired primacy for the AML for so long as the special position of SOE's in the eyes of the judiciary prevails, whatever the terms of the AML may be expressed to be at any particular time. In this key respect, the case law amply demonstrates consistent deference by the Judiciary to the interests of SOEs. While this remains so, AML Legitimacy and Effectiveness concerns will not be solved either by SAMR's reform proposals or the 2021 Bill, in particular on the Legitimacy question. This is because the Judgments considered in this article demonstrate that the AML's antitrust prohibitions (modeled on European Union competition concepts[175]) are evidently not seen as hierarchical norms by the Judiciary in private antitrust actions.

If this Legitimacy problem is not solved, then the SAMR 2020 reform proposals and the consequent 2021 Bill urging that the AML be given primacy[176] will remain unfulfilled. Even if a revised AML with SAMR's desire for its primacy to be legislatively re-emphasised is adopted following the 2021 Bill consultation process, there remains the significant problem

[172]. Zhang (n 67) pointing out SOEs are under the legislative obligation to observe and comply with the AML, but in fact they continue to operate without interference from the AML's application.
[173]. *See* Section 4.
[174]. Including those charged with antitrust enforcement using public powers: this deference to the interests of SOEs is seen also in public antitrust enforcement, which though outside the scope of this article, has also traditionally treated SOEs somewhat leniently in SOE antitrust violations than private enterprises: *see* (n 69).
[175]. e.g., prohibiting abuses of dominance; price-fixing; market-sharing; etc..
[176] Article 4 of the Bill states that the Government needs to emphasise the primacy of competition policy in the market.

of Judicial inertia combined with an apparent lack of understanding by the Judiciary when it comes to understanding and applying antitrust concepts in antitrust actions. As long as a Legitimacy question mark hangs over the AML in the minds of the Judiciary, remedies granted for breach of the AML will remain in their current state of significant ineffectiveness.

The Judiciary's interpretation and application of the AML draws attention to a Legitimacy concern *par excellence*. Although the AML on its face requires all market actors to comply with the competition principles of the AML, as does SAMR the State supervisory regulator itself, yet, time and again, the courts in China have allowed clearly dominant SOE's (acting in what would be termed either as "collusive" or "abusive" fashion under the AML) to escape judicial condemnation under the AML.

On their own, SAMR's 2020 reform proposals calling for competition-neutrality by Government and observance of AML supremacy over the implementation of industrial policies, is not likely to alter the AML Legitimacy and Effectiveness concerns identified in this article for China's consumers and private enterprises. Mere restatement of the AML's authority in a revised AML will not, of itself, cause the Judiciary to change their approach in antitrust cases taken against SOEs.

All of the forgoing demonstrates that private antitrust litigation mechanisms in China remain ineffective for injured parties' protection when contesting SOE's behaviour in the market. The Legitimacy and Effectiveness of private antitrust enforcement mechanisms and norms therefore remain under serious question in China's judicial system at the present time. This raises the question whether steps can be taken to alter this situation. Clearly, legislative reform on its own cannot provide the game-changer solution: the Judiciary's case law effectively ignores key provisions of the AML and consequent Judicial deference to SOEs' interests since the AML came into force in 2008, demonstrates that the solution does not lie solely in legislative reform by itself. The post-2008 case law examined above bears this out.

In order to have a half decent chance of solving this problem, SAMR needs to (a) be empowered to appear before the courts in antitrust enforcement cases to offer expert opinion on antitrust concepts and the purpose of the AML; (b) judges require expert

antitrust training, as antitrust concepts are new to China business and legal culture[177]; (c) the AML requires a collective dominance test and the judiciary needs to be cognizant of utilising the single entity concept when determining whether SOE-dominated markets really are competitive; (d) ideally of course, a statement by the State Council advocating the Legitimacy of the AML and the need for its Effective implementation by the Judiciary would be the most helpful of all measures.

The current landscape facing consumers and private enterprises taking private antitrust enforcement actions against SOEs therefore presents a rather gloomy Effectiveness picture at the present time: most consumers and private enterprises taking private antitrust enforcement actions have failed to be compensated *at all* for their losses suffered as a result of SOE antitrust infringements.[178] In those rare cases where they were successful, litigants are granted ineffective remedies, consisting of low compensation awards, confined to recovery of actual loss, with no award of any damages or compensatory element. To compound the Effectiveness problem, the courts do not usually award the level of litigation costs claimed by successful litigants.[179] In its totality, this unfortunate approach can be attributed to the judicial authorities de-prioritising the AML, demonstrated by the Judiciary's repeated reluctance to make findings of either dominance[180] or of abuse of dominance, against dominant SOEs who were clearly acting anti-competitively. By contrast, SOEs continue to generate high profits arising from monopoly practices; engage in abusive conduct[181] and price-fixing[182]; and pursue industrial policies which are not competition-neutral, contrary to the desired competition-neutrality sought by SAMR.

The only conclusion the authors can come to, is that China's Judiciary recognize that SOE's occupy a key role in the economy as "national champions", set against the background of the Chinese legal and political business culture system, and so where the AML's provisions cut across SOE's interests, the AML provisions are not prioritised.[183]

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177. Jingyuan Ma and Mel Marouis, 'Business Culture in East Asia and Implications for Competition Law' (2016) 51 Tex. Int'l L. J. 2, 18-19.

178. *See* Section 4; in particular, *see* (n 129) and accompanying text (the successful plaintiffs mostly were not awarded what they claimed).

179. Angela HY Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?' (2015) 51 Stanford J. Int'l L. 195, 213 pointing out "the cost of bringing a case against an SOE will be higher than bringing one against a non-state firm [...]".

180. *e.g.*, *Yang Zhiyong v China Telecom (2015)*.

181. *e.g.*, *Bao Cheng v Wuxi China Resources (2012)*.

182. *e.g.*, *Hengli Guochang v Gree (2016)*.

183. This approach further compounds the other weaknesses in the AML itself which are not addressed by

Two final observations are pertinent. The first is instructive should commentators critical of such observation plead that China has its own unique approach to such matters: although Article 7(1) of the AML 2007 demonstrates that the State sees SOEs as occupying a key role in "[...] the lifeline of national economy and national security"[184], it should be pointed out that Article 7(1) AML *was not pleaded* in any of the cases considered in this article. In none of the cases considered in this article was it advanced by any of the defendant SOEs that national economic security or national security interests were at stake. Yet the courts, in cases involving AML challenges against SOEs appear to disregard the very clear direction found in Article 7(2) AML which provides that SOE's must operate lawfully and not damage the interests of consumers by virtue of their dominant or exclusive positions.[185] It seems apparent that Article 7(2) is not properly considered by the courts, thereby aggravating Legitimacy concerns surrounding the application of the AML and its status in the eyes of China's courts, which appear to favour industrial policy progression over competition compliance. The courts seem to be setting a course directly opposite to what SAMR's 2020 reform proposals aim for, i.e., elevation of the status of the AML above that of unbridled deference to industrial policy.[186]

The second observation is that moreover, this privilege afforded to China's SOEs at home, which allows them to strengthen their dominance and profitability in the massive China home market by undertaking anti-competitive activities without fear of judicial sanction, affords SOEs a significant comparative advantage when they compete abroad against foreign competitors, who have to operate in compliance with antitrust enforcement in their own home markets. This disparate antitrust treatment can confer significant comparative advantage, and the significance of China's SOEs global economic power should not be underestimated. For instance, by the end of 2019, nearly 100 companies on the

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SAMR's reform proposals at all, e.g., lack of indirect purchasers right to sue; and deficiencies in the availability or scope of restrictive collective litigation mechanisms, which fall outside the scope of this article which has focused on antitrust Legitimacy and Effectiveness concerns in the context of SOE cases.

[184]. AML, Art 7(1): "With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or industries implementing exclusive operation and sales according to law, the State protects the lawful business operations conducted by the business operators therein […]".

[185]. AML, Art 7(2): "[SOEs] shall operate lawfully […] and shall not damage the interests of consumers by virtue of their dominant or exclusive positions".

[186]. *See*, for example, the following Judgments considered earlier above where SOEs clearly were acting contrary to Art 7(2) with no apparent drawbacks: *Yang Zhiyong v China Telecom (2015); Bao Cheng v Wuxi China Resources (2012); Hengli Guochang v Gree (2016)*.

Fortune Global 500 were Chinese SOEs[187] compared to around only 30 some ten years earlier[188], and only 9 some twenty years ago.[189] Evidence that these powerful multinational SOEs are now on the march around the globe can be seen in recent examples such as China Railway Construction Corporation's 2020 offer to construct the controversial high-speed multi-billion dollar HS2 rail line in the UK, for a far cheaper price and in a faster timeline than offered by western contractors.[190] Other examples include China Harbour Engineering Company's major role in building the Hamad Port in Doha (one of the largest ports in the Middle East)[191], and China COSCO's[192] investments in over 60 ports globally. Given the global economic strategy of many of China SOEs (of which the forgoing are merely three of many examples), one might be forgiven for concluding somewhat pessimistically that SAMR's desire for AML primacy "at home" may run counter to the economic expansion ambitions[193] of these powerful global SOEs, and hence the prospects for stronger AML enforcement may remain an unfulfilled ambition unless measures such as those proposed above are taken.

187. Geoff Colvin, 'It's China's World' (*Fortune*, 22 July 2019) <https://fortune.com/longform/fortune-global-500-china-companies/>.
188. 'Global 500' (*Fortune* 2009) <https://fortune.com/global500/2009/>.
189. Angang Hu, *China's Road and China's Dream: An Analysis of the Chinese Political Decision-Making Process Through the National Party Congress* (Springer 2018) 51.
190. Gill Plimmer and George Parker, 'China Offers to Build HS2 in Five Years and for Less Money' (*Financial Times*, 14 Feb 2020) <www.ft.com/content/d5b6aaaa-4f1a-11ea-95a0-43d18ec715f5>.
191. Mordechai Chaziza, 'China-Qatar Strategic Partnership and the Realization of One Belt, One Road Initiative' (2020) 56 China Report 78, 86.
192. 'China Is Making Substantial Investment in Ports and Pipelines Worldwide' (*The Economist*, 6 Feb 2020) <www.economist.com/special-report/2020/02/06/china-is-making-substantial-investment-in-ports-and-pipelines-worldwide>.
193. China's SOEs are now engaged in projects around the world: *see* (n 12) and accompany text.