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# Legitimacy & Effectiveness Concerns arising in Private Antitrust Litigation involving State-Owned Enterprises in China

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# Legitimacy & Effectiveness in the AML/SOE Context

## Legitimacy

In the context of enforcing the AML (*China's Anti-Monopoly Law*) against SOEs (State-owned enterprises):

**Legitimacy** 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 as tantamount to ignoring express statutory prohibitions.

## Effectiveness

In the context of consumers or enterprises attempting to enforce the AML against SOEs, **Effectiveness** means that:

- courts actively entertain litigation, and
- court awards provide 'full' compensation, including legal costs, to compensate actual losses.



# L&E Issues:

## Lack of Competition Neutrality

*Bao Cheng v. Wuxi China Resource (2012)*

*Yunnan Yingding v. Sinopec (2017)*

## Inadequacy of Compensation Awards

*Wu Xiaoqin v. Shaanxi TV (2016)*

*Wu Zongqu v. Yongfu Water (2018)*

*Wu Zongli v. Yongfu Water (2018)*

## Failure to Apply Dominant Position Test properly to SOEs

*Yang Zhiyong v. China Telecom (2015)*

*Bao Cheng v. Wuxi China Resource (2012)*

# Consumers / Enterprises Vs. SOEs:

## Legitimacy concerns in antitrust litigation

- **AML Art 13:**

Prohibits price fixing

- **AML Art 14:**

Prohibits resale pricing

- **AML Arts 17 & 19:**

Prohibits abuse of dominant position

Legitimacy

- *Hengli Guochang v. Gree (2016)* – Minimum Pricing

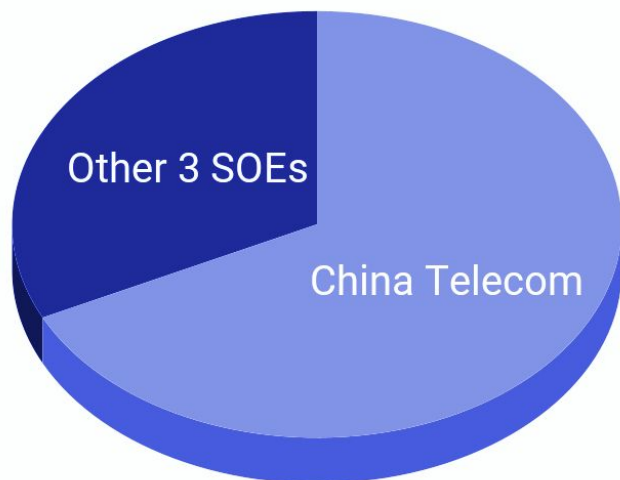
- *Bao Cheng v. Xi Chuan Source (2012)* – Refusal to supply Sony

- *Yunnan Yingde v. Tec (2017)* – Refusal to supply

- *Yang Zhenyong v. China Telecom (2015)* – Questionable Definition of Dominant Position

# Yang Zhiyong v. China Telecom (2015) – Questionable Definition of Dominant Position

## Broadband Market Share in 2013 in Shanghai



**3 SOEs “Competitors”**  
(China Mobile, Unicom, Railcom)

Providing similar broadband  
services at lower prices

**A competitive market!**

# Effectiveness: What does “winning” look like?

- **AML Judicial Interpretation**

- **No.5 [2012] Art 14:**

- ... actual losses & perhaps reasonable expenses

- **AML Art 17:**

- Prohibits abuse of dominant position



**Effectiveness**

- *Wu Xiaoqin v. Shaanxi TV (2016)* – Compensation (“actual loss” – \$2.2)

**WIN**

- *Wu Yanyan v. Wuyang TV (2018)*

- *Wu Zhenli v. Wuyang TV (2018)*

- – Compensation (actual loss + 6% interest + “legal costs” – 1/5 of the actual legal costs)

# Wu Xiaoqin v. Shaanxi TV (2016)

## – Compensation

### Shannxi TV

– 100% market share in the local TV service market

Wu was forced to pay for digital TV (*the service he did not required*) – USD 2.2

**4 Years Trail**

**approx. 1080 kilometers**  
one way (Xi'an–Beijing)

“actual loss”  
– \$2.2



# The State Administration of Market Regulation (SAMR)'s *2021 AML Amendment Bill*

– Does it overcome **Legitimacy & Effectiveness** concerns in antitrust litigation involving SOEs taken by consumers / enterprises?



## Legitimacy & Effectiveness concerns arising from case law – are they cured by 2021 AML Am. Bill?

| <b><i>The problem: AML &amp; Its Judicial Interpretation</i></b>  | <b><i>What the Bill does</i></b> |
|---|----------------------------------|
| AML Art 13: Prohibits price fixing ( <i>Legitimacy</i> )  | No mention (L)                   |
| AML, Art 14: Prohibits resale pricing ( <i>Legitimacy</i> )   | No mention (L)                   |
| AML, Arts 17 & 19: Prohibits abuse of dominant position ( <i>Legitimacy &amp; Effectiveness</i> )                           | No mention (L&E)                 |
| AML Judicial Interpretation No.5 [2012] Art 14:<br>Compensates actual losses & reasonable expenses ( <i>Effectiveness</i> ) | No mention (E)                   |

# Other unresolved issues

## Lack of Competition Neutrality

Art 4 AML Am Bill restates AML's supremacy, but:

- More than words is needed
- SAMR supremacy over SOEs must occur in reality
- Antitrust judges need dedicated training

## Inadequacy of Compensation Awards

No improvement of the current unsatisfactory situation

## Failure to Apply Dominant Position Test properly to SOEs

AML still does not have:

- a collective dominance test
- a single entity concept



# Our Recommendations

1. SAMR should appear before the courts in antitrust enforcement cases to offer expert opinion on antitrust concepts and the purpose of the AML to assist the judges;
2. Judges require expert antitrust training, as antitrust concepts are new to China business and legal culture to overcome the misapplication of core antitrust concepts;
3. The AML requires a collective dominance test and the judiciary needs to be cognizant of utilizing the single entity concept when determining whether SOE-dominated markets really are competitive;
4. Ideally, 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.

# World Competition

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*The END*

*Thank you for listening!*