Competition Neutrality in Courts:

Can *China's Anti-Monopoly Law 2022* ensure the supremacy of competition law in antitrust private litigation involving State-Owned Enterprises

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Abstract

China adopts a new (revised) Anti-Monopoly Act (AML 2022), which came into force on 1st August 2022. One of the key amendments was introduced by Article 4 of the 2022 Act, stating "[t]he State adheres to the principles of marketisation and the rule of law; strengthens the fundamental status of competition policy […]". Focusing on this very amendment, in this Article the author will review three leading antitrust cases heard before China's courts between 2012 and 2022, taken by private enterprises challenging State-Owned Enterprises (SOEs), to illustrate how China's courts have stepped away from protecting competition and misapplying key antitrust concepts, such as the abuse of dominant position. By closely examining three cases – namely *Bao Cheng v. Wuxi China Resource* (2012); *Yunnan Yingding v. Sinopec* (2017), and *Weihai Hongfu v. Weihai Water* (2022), this Article will demonstrate that the lack of competition neutrality in courts challenges antitrust provisions, and thereby, injured parties (e.g., private enterprises) were left in pain.

Although promoting the supremacy of competition law is one of 5 pillars of the amended AML 2022, the new Act makes no reference to the Judiciary's role in antitrust private enforcement to ensure competition neutrality in the market, apart from strengthening interplay between public and private enforcement (Article 11, AML 2022) and officially introducing antitrust public interest litigation (Article 60, AML 2022). This rarely amended area of antitrust private enforcement leaves the future of injured parties in doubt. Can AML 2022 protect private enterprises (non-SOEs) in antitrust private enforcement and maintain competition neutrality against SOEs in court? This Article will provide an answer, and suggestions to overcome judicial uncertainty against SOEs' anti-competitive practices will be proposed.

Keywords: Anti-Monopoly Act 2022; competition law; China; competition neutrality; SOEs; antitrust; private antitrust enforcement.

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I. INTRODUCTION

The first major legislative update of *China's Anti-Monopoly Law (AML) 2007*[2] was enacted in June 2022 and came into force on 1 August 2022.[3] The Amended AML 2022 highlights the following five changes:

1) ensuring the supremacy of China's competition law and policy in the marketplace[4];
2) keeping a close eye on infringements in the digital sector[5];
3) illegal per se no longer applying to resale price maintenance[6];
4) increasing penalties for antitrust infringements[7];

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[2]. 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]. 'China's Revised Anti-Monopoly Law to Come into Effect on August 1' *Global Times* (24 June 2022), available at <www.globaltimes.cn/page/202206/1268947.shtml>.

[4]. AML 2022, Arts 4, 5 & 11.

> **Article 4:** The leadership of the Communist Party of China shall be adhered to when carry out anti-monopoly compliance work.
> The State adheres to the principles of marketisation and the rule of law, strengthens the fundamental status of competition policy, formulates and implements competition rules which are compatible with the socialist market economy, improves macro-control, and cultivates a unified, open, competitive and orderly market system.
> **Article 5:** The state establishes and improves the fair competition review system.
> Administrative authorities and any other organisations authorised by laws and regulations with functions of managing public affairs shall conduct fair competition reviews when formulating regulations for regulating economic activities.
> **Article 11:** The State shall improve anti-monopoly regulations and framework; strengthen anti-monopoly supervision powers; increase regulatory capabilities and upgrade the level of modernisation of regulatory systems; improve the mechanism to link public enforcement with judicial work; hear and handle monopoly cases fairly and efficiently in accordance with the law, and safeguard fair competition.

[5]. AML 2022, Arts 9 & 22.

> **Article 9:** Business operators shall not use data, algorithms, technologies, capital advantages, and platform rules, etc. to engage in any monopolistic conduct prohibited by the AML.
> **Article 22:** […] Business operators with dominant market positions shall not use data, algorithms, technologies, platform rules, etc. to engage in the abuse of dominance as prescribed in the preceding paragraphs […]

[6]. AML 2022, Art 18.

> **Article 18:** Business operators are prohibited from reaching the following monopolistic agreements:
> (1) Fixing the resale price to a third party;
> (2) Setting the minimum price for resale of goods to a third party;
> (3) Any other monopolistic agreements as identified by the anti-monopoly law enforcement agency of the State Council.
> The agreements specified in (1) and (2) of the preceding paragraphs shall not be prohibited if the business operator can prove that it does not have the effect of excluding or restricting competition.
> Where the business operator can prove that its market share in the relevant market falls below thresholds stipulated by the anti-monopoly law enforcement agency of the State Council, but other conditions are fulfilled, the agreement shall not be prohibited.

[7]. AML 2022, Arts 56, 58 & 63.

> **Article 56:** Where business operators reach an monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year. If no sales revenue were made in the last year, a fine of no more than 5 million yuan shall be imposed. If the monopoly agreement entered into has not been implemented, a fine of no more than 3 million yuan may be imposed. If the legal representative, or any directly responsible person of the business operator's organisation was personally liable for the monopoly agreement entered into, a fine of no more than 1 million yuan may be imposed on that individual.
> Where a business operator arranges a monopoly agreement for other business operators or provides any substantive assistance to other operators in entering into a monopoly agreement, the preceding paragraph applies.
> Where any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a mitigated punishment or exemption from punishment.

5) upgrading the merger control regime.[8]

This article evaluates the effectiveness of the amendment on safeguarding the supremacy of competition law (e.g., Article 4 of the AML 2022) in China's marketplaces, by examining the provision misapplication of prohibiting the abuse of dominance in private antitrust actions taken in China's courts against State-Owned enterprises (SOEs[9]) by non-SOEs, demonstrating the Judiciary has failed to present competition neutrality.[10] To illustrate how the approach taken by the Judiciary in such cases negates competition neutrality[11] in courts, examination shall be undertaken of three landmark private antitrust enforcement cases – namely *Bao Cheng v. Wuxi China Resource* (2012); *Yunnan Yingding v. Sinopec* (2017), and *Weihai Hongfu v. Weihai Water* (2022)[12] – to analyse how

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> Where a guild help the achievement of a monopoly agreement by business operators in its own industry in violation of this Law, a fine of no more than 3 million yuan shall be imposed thereupon by the anti-monopoly authority; in case of serious circumstances, the social group registration authority may deregister the guild.
> **Article 58:** Where any business operator implements concentration in violation of this Law, and the concentration has an effect of excluding or restricting competition, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and a fine of 1% up to 10% of the sales revenue in the previous year shall be imposed. If business operator's concentration does not have an effect of excluding or restricting competition, a fine of no more than 5 million yuan shall be imposed.
> **Article 63**: In the case of particularly grave violation of the law with an exceptionally pernicious impact and exceptionally grave consequences, the State Council's anti-monopoly law enforcement authority may impose a fine of two times up to five times the amount of the fine stated in Article 56, 57, 58 or 62 hereof.

[8]. AML 2022, Arts 26 & 37.

> **Article 26:** For concentrations of business operators that meet notification standards prescribed by the State Council, operators shall notify the anti-monopoly law enforcement agency of the State Council in advance, and the concentration shall not be implemented if the notification is not made.
> Where the concentration of business operators falls below notification thresholds stipulated by the State Council, but there is evidence that the concentration has or may have the effect of excluding or restricting competition, the anti-monopoly enforcement agency of the State Council can request business operators to notify.
> If the business operators fail to notify in accordance with the provisions of the preceding two paragraphs, the anti-monopoly law enforcement agency of the State Council shall conduct an investigation in accordance with the law.
> **Article 37**: Anti-monopoly law enforcement agency under the State Council shall establish a categorised and tiered review system for concentrations [...]

[9]. SOEs are enterprises owned and controlled by the government.

[10]. The reason of this Article solely focusing on abuse of dominance private antitrust cases is such cases have been the majority of private antitrust cases in China: *see* "By the end of 2017, 700 first-instance cases of civil monopoly litigation were accepted […] Among the 700 cases, those concerning abuse of market dominance accounted for more than 90%." in Zhan Hao, Song Ying & Yang Zhan, 'A New Era Comes--Highlights of the Anti-Monopoly Law of China in 2018' (*Anjie Law Firm*, 2019), available at <www.anjielaw.com/uploads/soft/190201/1-1Z2011P339.pdf>.

[11]. OECD explains "Competitive neutrality in competition policy" as following: "It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages for example due to their ownership or nationality. Government actions can sometimes prevent, restrict or distort competition within a market. They can set procurement/tax rules or regulatory regimes putting private companies at a disadvantage compared to state-controlled or supported firms, or yet, they can assign market regulatory functions to firms that currently or potentially compete on the same markets. Ensuring a level playing field is, therefore, key to enabling competition to work properly and deliver benefits to consumers and the wider economy." *See* 'Competitive Neutrality in Competition Policy' (*OECD*, 2022), available at <www.oecd.org/competition/competitive-neutrality.htm>.

[12]. 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* (2012)); 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* (2017)), and Judgment pending handing down by the

dominant position is defined *in the eyes of the Judiciary* challenging the AML's antitrust norms and creating an obstacle to realise the supremacy of China's competition law. This judicial approach raises an essential concern, because the AML 2022 fails to implement correction to address such courts' approach in private antitrust enforcement.[13]

II. THE AWAKENING: THE IDEA OF PROMOTING COMPETITION NEUTRALITY

Given the long history of State intervention in the marketplace since the People's Republic of China was founded in 1949, industrial policies have played a vital role and featured China's economic development[14], without proper regulations from AML.[15] Such situation should be changed when China's first competition law, AML 2007, was enacted and came into force in 2008. However, after 2008, industrial policy implementation maintains its priority over compliance with antitrust norms[16], in light of promoting the development of SOEs.[17] In order to break out of this routine, competition neutrality was officially introduced for the first time in 2018 aiming to provide a level playing field between SOEs and non-SOEs.[18] This idea was further developed by China's chief antitrust regulatory authority – the State Administration for Market Regulation (SAMR), by emphasising the State's neutral position in the market in its *2020 Draft on the Amendment of the AML*[19], and highlighting the

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Supreme People's Court of China in 2022 in *Weihai Hongfu v. Weihai Water* (2022) [*威海涉水务公司滥用市场支配地位上诉案*].

More analysis on how the private antitrust enforcement cases demonstrate unquestionably anti-competitive activity (e.g., abuse of dominance) by SOEs, *see* Dermot Cahill & Jing Wang, 'Addressing Legitimacy Concerns in Antitrust Private Litigation involving China's State-Owned Enterprises' (2022) 45(1) World Competition 75-122.

[13]. Amendments relating to private antitrust enforcement have been introduced in Articles 11 & 60, AML 2022 which rarely have any effects on competition neutrality in courts in private antitrust actions taken against SOEs:

> **Article 11:** The State shall […] improve the mechanism to link public enforcement with judicial work, […] and safeguards fair competition.
>
> **Article 60**: [...] Where an undertaking commits a monopolistic act that infringes on the public interests, the People's Procuratorate at or above the level of cities with districts may file a civil public interest litigation in the People's Court in accordance with the Law.

[14]. The 'Five-Year Plan System' and other industrial policies have been used for decades to direct China's economic development: *see* Robert M. Rosse, 'The Working of Communist China's Five Year Plan' (1954) 27 Pacific Affairs 16; Yao Yang, 'China's Bold New Five Year Plan' (2020) 12(4) East Asia Forum Q. 6; John VerWey, 'Chinese Semiconductor Industrial Policy: Past and Present' (2019) July J. Int'l Com. & Econ. 1.

[15]. D. Daniel Sokol, 'Tensions between Antitrust and Industrial Policy' (2015) 22 Mason Law Rev. 1274-68.

[16]. Case studies in China's steel, telecom and petroleum industries demonstrate the supremacy of industrial policies in economy: *see* Dermot Cahill & Jing Wang, 'How Competition Ideals Are Emasculated in Key Industries in China' (2021) 44(3) Fordham Int'l L. J. 609-670.

[17]. *See* a typical example of a lack of genuine competition in the market created by industrial policies promoting SOEs and sidelining privately-owned small and medium-sized enterprises in: Jing Wang, 'A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned SMEs in China' (2017) 25(3) Michigan State Int'l L. Rev. 491-554.

[18]. 'Yi Gang (President of the People's Bank of China)'s Remarks and Q&A at the G30 International Banking Seminar in 2018' [易纲行长在 2018 年 G30 国际银行业研讨会的发言及答问] (*The People's Bank of China*, 14 October 2018), available at <www.financialnews.com.cn/jg/ld/201810/t20181014_147450.html>.

[19]. 'SAMR Draft on the Amendment of the AML', Art 4: stating that the government should maintain a neutral position in the market.

fundamental position of competition law in the marketplace in *the 2021 Amendments to AML*.[20] AML 2022 further confirms "[t]he State adheres to the principles of marketisation and the rule of law; strengthens the fundamental status of competition policy […]"[21]

In parallel, China's State Council officially introduced a fair competition review system in 2017 to regulate State intervention in the market and avoid anti-competitive practices[22], which requires all industrial policies should undergo a fair competition review to ensure they in accordance with the AML. If the policy against competition prohibitions, it must be amended and go through fair competition review again to seek approval.[23] This was written in SAMR's *2020 Draft on the Amendment of the AML*.[24] However, such wording and detailed implementation method were not fully enacted in the AML 2022, although Article 5, AML 2022 states to further develop and implement the fair competition review system like a slogan.[25]

In fact, this is not the first time to have Articles in the AML to express similar ideas to regulate State intervention (e.g., industrial policies) and maintain competition neutrality in the market.[26] However, whether these Articles will be implemented or not in practice remains a question.[27] On one hand, the 'Implementing Rule of the Fair Competition Review System (interim)' (2017) offers exemptions for industrial policies to protect national interests.[28] This is foreseeable that such exemptions can be used to follow China's government-oriented economic model and sideline antitrust prohibitions[29], such as the ongoing Mixed-Ownership Reform.[30] On the other hand, Articles 4, 5 and 11 of the AML 2022, which were designed to fulfill the supremacy of the AML, mainly focus on competition regulatory authority's power while largely omit the Judiciary. However, competition regulatory authority in

[20]. '2021 Amendments to Anti-Monopoly Law of China', Art 4: stating that the State strengthens the fundamental position of competition regulation.
[21]. AML 2022, Art 4.
[22] The State Council of China, 'Opinions on Establishment of the Fair Competition Review Mechanism in the Development of Market System' (2016).
[23] The 'Implementing Rule of the Fair Competition Review System (interim)' (2017), Annex 1.
[24]. SAMR Draft on the Amendment of the AML, Art 9.
[25]. AML 2022, Art 5.
[26]. *e.g.,* the AML 2007, Art 8 states "No administrative organisation empowered by law or regulation shall abuse its administrative powers to eliminate or restrict competition."
[27]. *See* criticism about the AML 2007's implementation in Angela HY Zhang, *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* (OUP 2021) 68-116.
[28] The 'Implementing Rule of the Fair Competition Review System (interim)' (2017), Art 18.
[29]. Alexandr Svetlicinii, 'Consolidation of the State-Owned Enterprises in China: A Missed Opportunity for the EU Merger Control?' (2022) 13(1) Journal of European Competition Law & Practice 17–28; 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; Angela HY Zhang, 'The Antitrust Paradox of China Inc.' (2017) 50 NYU J. Int'l L. & Pol'y 159.
[30] Mixed-Ownership Reform allows private funds to invest SOEs and *vice versa*: Changhong Pei, Chunxue Yang & Xinming Yang, 'Rationalizing Institutional Mechanisms, Developing Mixed Ownership' in Changhong Pei, Chunxue Yang & Xinming Yang, *The Basic Economic System of China* (Springer 2019) 185; Wang Lu, '项目批量涌现 国资民企双向混改提速' [Emerging Projects Showing in the Speeding up of the Mixed-Ownership Reform] *经济参考报* [*Economic Information Daily*] (Bejing, 18 November 2020) A2. *See* further discussion in Jing Wang & Gary Clifford, '*The 2007 Anti-Monopoly Law of China* facing efficacy challenges from the ongoing Mixed-Ownership Reform' (2022) 43(2) European Competition L. Rev. 61, 70-72.

general offers an SOE-friendly environment.[31] Hence, enhancing antitrust private enforcement should be necessary in order to restrict SOEs' anti-competitive practices and contribute to the achievement of competition neutrality in China's domestic marketplace.

III. LOST IN SLUMBER: COMPETITION NEUTRALITY *VS.* SOES IN COURTS

It may not surprising that the Judiciary has not been fully motivated to enforce AML's antitrust provisions against SOEs given China's government-oriented economic model has been operating for decades.[32] In addition, as the first China's AML only came into force in 2008, the less than 15-year implementing experience challenges the Judiciary's knowledge in this specific area.[33] Because AML itself grants exemptions to industrial policies and SOEs based on the grounds of protecting national interests and public interests[34], placing a priority on antitrust prohibitions over industrial policies or SOE's anti-competitive behaviour can be difficult for the Judiciary.[35] These all together lead to a situation that the private antitrust enforcement can be ineffective for non-SOEs protection when against SOEs.[36]

Three leading cases[37] will be discussed to demonstrate how the Judiciary applies the AML in court decisions in practice misapplied antitrust concepts and in favour of SOEs. These three cases all focus

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[31]. Angela HY Zhang, 'Strategic Public Shaming: Evidence from Chinese Antitrust' (2019) 1 China Q. 1; Xiaoye Wang, 'Six Severe Challenges in Implementing China's Anti-Monopoly Law' (2018) 14 Competition Pol'y Int'l 3-4; Neal D Woods, 'Regulatory Analysis Procedures and Political Influence on Bureaucratic Policymaking' (2018) 12 Reg. & Gov. 299.

[32]. Wendy Ng, 'State Interest and the State-Centered Approach to Competition Law in China' (2022) 65(2) The Antitrust Bulletin 297-311.

[33]. Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar 2014) 227.

[34]. AML 2022, Arts 1 & 8 (AML 2007, Arts 1&7).

> **Article 1:** This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the public interest, and promoting the healthy development of socialist market economy.
> **Article 8:** With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.
> The business operators as mentioned above 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.

See further discussion on this point in: Cahill & Wang, 'How Competition Ideals Are Emasculated in Key Industries in China' (n 16).

[35]. Xiaoye Wang & Adrian Emch, 'Competition Law 2.0 – Amending China's Anti-Monopoly Law' (2021), available at <https://ssrn.com/abstract=3799023>; Zhang, *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* (n 27).

[36]. Tad Lipsky, 'Overdeterrence, Non-Competition Policy Goals, and Inadequate Defense Rights – Identifying (and Fixing) Antitrust Constraints on International Trade' (2021) 84 Antitrust Law Journal 185, 202.

[37]. *Bao Cheng v Wuxi China Resources* (2012); *Yingding v Sinopec* (2017), and *Weihai Hongfu v. Weihai Water* (2022, judgment pending).
More analysis on how the private antitrust enforcement cases demonstrate unquestionably anti-competitive activity (e.g., abuse of dominance) by SOEs, *see* Cahill & Wang, 'Addressing Legitimacy Concerns in Antitrust Private Litigation involving China's SOEs' (n 12).

on prohibiting abuse of dominant position[38], which so far consists 90% private antitrust cases in China.[39] Given these three cases have been handed by courts during a 10-year period (in 2012, 2017, and 2022, respectively), these judgments paint a sketch of the Judiciary's interpretation of competition neutrality involving SOEs.

A. SOEs Refusing to Trade: Escape with No Penalty

According to the judgments of *Bao Cheng v Wuxi China Resources* (2012) and *Yingding v Sinopec* (2017), both defendants – China Resources and Sinopec (SOEs) – had a lucky escape from their anti-competitive practices. Although they both hold a dominant position in the specific case defined relevant market, their conducts of refusal of supply or refusal to trade were not considered as breach of the AML by the Judiciary.[40] In other words, the court did not find in favour of the plaintiffs (private companies), although they had been treated by anti-competitive conducts.

1. An Objective Justification or A Non-Objective Reason: *Bao Cheng v China Resources* (2012)[41]

Bao Cheng, a private company specialised in inspection and installation of compressed natural gas cylinders for vehicles in city Wuxi, sued *China Resources*, an SOE and the only natural gas supplier for vehicles in the local (city) market, on the ground that in 2010 *China Resources* refused to supply natural gas for a taxi converted by *Bao Cheng* without an objective justification.[42] *Bao Cheng* on behalf of the converted taxi owner, applied for natural gas supply permission from *China Resources* after the taxi was converted and certified as a natural gas vehicle on 16 August 2010. However, the natural gas supply application was rejected three times in 2010 as *Bao Cheng* was in *China Resources'* trading blacklist due to its complaint about one of *China Resource*'s management personnel. This refusal of supply caused that the converted taxi was unable to go on road. *Bao Cheng*, therefore, paid

[38]. AML 2022, Art 22 (AML 2007, Art 17).

> **Article 22:** A business operator with a dominant position shall not abuse its dominant position:
> (1) selling or buying commodities at unfairly high prices;
> (2) selling commodities at below-cost prices without any justifiable cause;
> (3) refusing to trade with a trading party without any justifiable cause;
> (4) restricting trading counterparties to trade only with themselves or with undertakings designated by them without any justifiable cause;
> (5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;
> (6) applying dissimilar prices or other transaction terms to counterparties with equal standing;
> (7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council.
> Business operators with dominant market positions shall not use data, algorithms, technologies, platform rules, etc. to engage in the abuse of dominant market positions as prescribed in the preceding paragraphs […]

[39]. Zhan Hao, Song Ying & Yang Zhan, 'A New Era Comes--Highlights of the Anti-Monopoly Law of China in 2018' (*Anjie Law Firm*, 2019), available at <www.anjielaw.com/uploads/soft/190201/1-1Z2011P339.pdf>.
[40]. AML 2022, Art 22(3) (AML 2007, Art 17(3)).
[41]. Judgment no.4 handed down by the Jiangsu High People's Court of China in 2012 in *Bao Cheng v Wuxi China Resources*.
[42]. AML 2022, Art 22(3) (AML 2007, Art 17(3)).

RMB 9,000 Yuan (approximately USD $1389) to the taxi owner on 30 December 2010, to compensate the loss of the off-road vehicle during the natural gas supply application period in 2010.[43]

China Resources was not found breach of the AML's provision for the refusal of supply because the Court accepted *China Resources*' claim that the refusal of supply was due to lack of natural gas in the local market for converted vehicles. Thus in the eyes of the Court, this was not abuse of dominant position (holding 100 percent market share), but delayed supply, because *Bao Cheng*'s application made on behalf of the converted taxi owner was approved on 4 January 2011. Even though evidence clearly indicated that natural gas supply permissions were granted to other customers when *Bao Cheng*'s application was repeatedly rejected, such evidence was not accepted by court. Furthermore, the court failed to accept the fact that the refusal of supply by the dominant SOE supplier of natural gas fuel was in fact based on a non-objective reason – *Bao Cheng*'s complaint about one of *China Resource*'s management personnel! This judgment and judicial reasoning exhibit that the Court took an SOE-friendly approach, and cause competition neutrality between SOEs and non-SOEs nowhere to stand. This approach which ought to be forbidden was taken by courts again in 2017 and 2020 in another case for SOE's refusal to trade.

2. Legal Obligation *vs.* Invitation to Trade: *Yunnan Yingding v Sinopec* (2017)[44]

Yingding, a private bio-energy company, sued *China Sinopec*, a global SOE, who refused to purchase *Yingding*'s biofuels.[45] Complying with Article 16(3) of the *Renewable Energy Law of China 2005*[46], petroleum sales enterprises (e.g., *Sinopec*) have obligations to purchase biofuels from producers (e.g., *Yingding*), which meet production and technical standards. However, *Sinopec* had refused to buy biofuels from *Yingding*, although *Yingding* provided a series of official documents to proof the biofuels they produced had met the required standards. Shockingly, these official documents were not fully valued as evidence by Yunnan High People's Court. Thus, notwithstanding that *Sinopec*'s dominant position in the local market (over 50% market share) was confirmed in the 2017 judgment, the court insisted that an actual breach of the AML's abuse of dominant position provision was not occurred, because *Sinopec* was not obligated to purchase biofuel from *Yingding* without receiving *Yingding's formal invitation to trade*. This legal reasoning should be treat as suspicious, for the

[43]. *Bao Cheng v Wuxi China Resources* (2012).
[44]. Judgment no.122 handed down by the Yunnan High People's Court of China in 2017 in *Yingding v Sinopec*.
[45]. *Yingding v Sinopec* (2017) – the first private antitrust action taken by a private company against a central SOE (i.e., an SOE controlled by the Central Government): *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).
[46]. The Renewable Energy Law of China 2005, Art 16(3).

> **Article 16:** "[...] (3) 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."

following two reasons: First, *Sinopec*'s obligation to purchase biofuel meeting satisfactory quality is a legal obligation[47] which cannot be changed without certain law amendments. Second, *Yingding* provided evidence to proof formal invitation to trade had been repeatedly sent to *Sinopec* but had been continuously ignored.

Received this unsatisfactory court decision in 2017, *Yingding* applied for retrial to the Supreme Court of China, which was rejected in March 2020.[48] The Supreme Court upheld Yunnan High People's Court's view on the documents *Yingding* provided to proof the biofuels had met the required standards, and it was not *Sinopec*'s obligation to purchase biofuel from *Yingding*. Furthermore, the Supreme Court held *Sinopec*'s refusal to trade had not affected its competitors' decision on trading with *Yingding*; therefore market competition was not restricted. Accordingly, *Sinopec* should not be found abuse of dominant position. It is obvious that this Ruling is against an antitrust provision – namely "A business operator with a dominant position shall not abuse its dominant position […] refusing to trade with a trading party without any justifiable cause."[49] However, in the eyes of the Judiciary who takes an SOE-friendly approach, interpreting antitrust provisions as the way the AML should be is hard to be their priority. Will this approach be changed after the AML 2022 came into force? *Weihai Hongfu v. Weihai Water* (Pending)[50] will offer some insight.

B. Change Expected: Weihai Hongfu v. Weihai Water (Pending)[51]

Weihai Hongfu, a private real estate company sued *Weihai Water* in 2021, which is an SOEs and the only water supplier in Weihai City in charge of the construction and management of water supply and sewage facilities[52], on the ground that *Weihai Water* abused its dominant position. Firstly, *Weihai Water* restricted *Hongfu* to trade only with one of *Weihai Water*'s subsidiaries.[53] Secondly, *Weihai Water* tied products in such contract without objective justifications[54], to modify already installed water supply and drainage facilities that had been done by a different company. The original design of the water supply and drainage facilities to be installed in the *Hongfu* estate were reviewed by *Weihai Water* in 2015; the work had then been conducted based on the original design in 2017. *Weihai Water* examined all the installed facilities in early 2018 and confirmed the facilities failed to meet the

[47]. *ibid*.
[48]. Supreme Court of China's Retrial Review and Trial Supervision Civil Ruling in 2020 on *Yingding v Sinopec*. *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、中国石化销售有限公司云南石油分公司拒绝交易纠纷再审审查与审判监督民事裁定书]
[49]. AML 2022, Art 22(3) (AML 2007, Art 17(3)).
[50]. *Weihai Hongfu v. Weihai Water* (2022, judgment pending).
[51]. Judgment pending, handing down by the Supreme People's Court of China in 2022 in *Weihai Hongfu v. Weihai Water* (2022).
[52]. *Weihai Water* is responsible for the planning, designing, construction and management of urban water supply and drainage facilities in the local (city) market.
[53]. AML 2022, Art 22(4) (AML 2007, Art 17(4)).
[54]. AML 2022, Art 22(5) (AML 2007, Art 17(5)).

satisfactory quality regardless *Hongfu*'s evidence to proof the facilities meet the requirements and are safe to use. *Weihai Water*, thereby, required *Hongfu* to sign a labour and material contract with *Weihai Water*'s subsidiary to uninstall and modify the facilities. *Hongfu* argued they should be free to choose with whom to contract to carry out the modification. However, *Weihai Water* insisted it was in the interest of *Hongfu* financial-wise and quality-wise to contract with *Weihai Water*'s subsidiary.[55]

The Supreme Court hearing was held in April 2022 and the case judgment is now pending. Will the Supreme Court uphold the Court decision of second instance – meaning found no breach of the AML by *Weihai Water*? It is hard to foresee, as the Supreme Court judges required further evidence (e.g., technical standards of water supply and drainage facilities in the local market) to be submitted to the Court within a week after the hearing. However, there should be no doubt that the abuse of dominant position antitrust provision was breached by *Weihai Water* (holding 100% market share) for restricting to trade and tying products (i.e., signing a labour and material contract with a named company)[56], unless

1) an objective justification can be approved (such as satisfying specific technical standards) to justify *Weihai Water*'s anti-competitive practices, or
2) an SOE-friendly approach is going to be taken by courts again to undermine competition neutrality.

Given the court hearing was held in April 2022, more than three months prior to the AML 2022 come into effect[57], the pending judgment should remain in compliance with Article 17 of the AML 2017.[58] However, it is worth to evaluate whether the new 2022 Act will have a role to foster competition neutrality in courts, or not, in light of supporting private enterprises (e.g., *Hongfu*) to overcome their weak position in private antitrust litigation taken against SOEs (e.g., *Weihai Water*).

Focusing on the abuse of dominant position antitrust provisions – Article 22 of the AML 2022 (formerly Article 17 of the AML 2017) in particular – which relevant to the *Weihai Hongfu v. Weihai Water* case: Section 1 of the Article setting up the antitrust abuse of dominance provisions involves no amendment in the 2022 AML Act which is a positive sign as it ensures the stability of the provision. The new Section 2 of the Article which focuses on infringements involving technology in the digital sector[59], provides no particular improvements for private antitrust actions in traditional sectors. Hence, this Article is unable to solve the lack of competition neutrality in courts; it is, thereby, necessary to

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[55]. 'Court Hearing: Disputes over Abuse of Dominant Market Position (2022) Supreme Court (Civil No. 395)' [滥用市场支配地位纠纷（2022）最高法知民终 395 号] *China Court Trail Online* (27 April 2022), available at <https://tingshen.court.gov.cn/live/28902732>.
[56]. AML 2022, Art 22(4) & (5) (AML 2007, Art 17(4) & (5)).
[57]. AML 2022 comes into effect on 1 August 2022.
[58]. Now aka AML 2022, Art 22.
[59]. AML 2022, Art 22(2).

move onto a close examination of another three Articles of the AML 2022 (i.e., Arts 4, 5 & 11) which were designed to have the function to foster competitive neutrality in China.

First, in spite of the fact that a new Article – Article 5, was added in the AML 2022 stating the State establishes, develops and implements the fair competition review to ensure that all policies involving economic activities comply with the AML[60], this new Article has no reference to the Judiciary and it is for China's antitrust regulatory authority (SAMR) to carry out the fair competition review and enhance fair competition to avoid political influence. Second, the amendment in Article 4 emphasises the supremacy of the AML in the marketplace, but has not ruled out State intervention. Although allowing State intervention operation under antitrust regimes has been a general practice globally[61], the AML shall provide more clear boundaries for the intervention given China's long-last government-oriented economic model operation.[62] Third, even though the newly added Article 11 of the AML 2022 makes it clear to strengthen cooperation between public enforcement and private enforcement to safeguard fair competition, this Article majorly gives attention to enhance the power of SAMR rather than support the Judiciary to obtain a better sense of holding a competition natural position to ensure the supremacy of the AML when dealing with antitrust cases. To conclude, the Articles of AML 2022 that focus on achieving competition neutrality, have largely overlooked the role of Judiciary in antitrust private enforcement. The AML 2022, therefore, is unlikely to assistant the Judiciary to abandon its SOE-friendly approach and change private enterprises' weak position for good in private antitrust litigation taken against SOEs, and therefore, the supremacy of the AML will be hard to achieve in the market.

IV. CONCLUSION & SUGGESTIONS TO PROMOTE COMPETITION NEUTRALITY IN COURTS

Arising from the analysis of the three leading private antitrust actions taken against SOEs by non-SOEs[63], it is obvious that the Judiciary so far fails to apply the antitrust abuse of dominance provision properly, although the AML in general and in theory prohibits all market players from abusing their dominant position to restrict competition.[64]

[60]. AML 2022, Art 5.

[61]. *See* in general, *Balthasar Strunz, The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer 2018); Lawrence J. White, 'Antitrust Policy and Industrial Policy: A View from the US' in Abel M. Mateus & Teresa Moreira (eds), *Competition Law and Economics* (Elgar 2010) 320-331; Florin Bonciu, Competition and State Intervention Under Economic Crisis Circumstances: Some Characteristics of Romania' (2010) 9 Transformations in Business & Economics 260-272; Yoshiharu Ichikawa, 'The Tension between Competition Policy and State Intervention: The EU and US Compared' (2024) 3(4) Eur. St. Aid L.Q. 555-570.

[62]. *See* Section II where this was considered.

[63]. *Bao Cheng v Wuxi China Resources* (2012); *Yingding v Sinopec* (2017), and *Weihai Hongfu v. Weihai Water* (2022, judgment pending).

[64]. AML 2022, Art 22 (AML 2007, Art 17).

In the three discussed cases, there have been no disagreements on the fact that the defendants (SOEs) occupied a dominant position in the case defined relevant local markets. However, the courts failed to take a competition natural position to support the claims made by the three plaintiffs (private enterprises) against SOEs who abused their dominant position without objective justifications.[65] In sharp contrast, in *Bao Cheng v Wuxi China Resources* (2012) case, the Court accepted that *China Resources*' refusal of supply was solely delayed supply caused by the short-term lack of natural gas in the relevant market for vehicles, regardless of whether *China Resources* had granted supply permissions to other customers, or not, during the same period of time.[66] In *Yingding v Sinopec* (2017) case, the Court held *Sinopec* was not in abuse of a dominant position because competition in Yunnan biofuel market was not restricted by *Sinopec*'s refusal to trade with *Yingding*, which should be irrelevant to the fact of that *Sinopec* did not conduct its legal obligations to trade with *Yingding* and thereby left *Yinding* in a vulnerable position.[67] In the judgment pending case *Weihai Hongfu v. Weihai Water*, the Court is considering an objective justification (e.g. to satisfy technical standards) for *Weihai Water*'s anti-competitive practices – namely restriction to trade and tying products.[68]

Such phenomenon raises a key concern about how competition neutrality in court can be secured by the AML in antitrust private litigation taken against SOEs by non-SOEs. While the AML 2022 includes amendments to, in principle, ensure the supremacy of the AML in market activities[69], upon Article by Article inspection it becomes clear that these amendments are unable to support the Judiciary to sideline its SOE-friendly approach in antitrust private litigation.[70] Hence, injured parties (private enterprises) will still be left unprotected, and achieving the desired supremacy of the AML in the marketplace will be up in the air.

This raises the question what should be done to alter this situation and enhance the effectiveness of the AML in court to ensure the courts follow antitrust provisions rather than sidelining the AML. The following two suggestions shall be considered in order to minimise judicial uncertainty in private antitrust litigation taken against SOEs' anti-competitive practices:

1) Expert antitrust training should be arranged for judges, to help them understand and apply antitrust concepts align with the AML prohibitions, regardless the political-influenced business and legal culture[71] in court decisions.

2) Given the AML is relevantly new in China (enforcement starts in 2008) and to gain deep understanding of the Law requires specific knowledge in the area, it will be helpful if the Judiciary

65. *See* Section III where this was considered.
66. *See* Section III.A.1 where this was considered.
67. *See* Section III.A.2 where this was considered.
68. *See* Section III.B where this was considered.
69. AML 2022, Arts 4, 5 & 11.
70. *See* Sections II and III.B where this were considered.
71. Jingyuan Ma & Mel Marouis, 'Business Culture in East Asia and Implications for Competition Law' (2016) 51 Tex. Int'l L. J. 2, 18-19.

can seek expert advice (e.g., SAMR) when dealing with complex antitrust cases. This approach may ensure competition neutrality being fully considered and addressed in court. This model is not coming from nowhere: it is worth to observe and learn how the European Commission assists European Union and EU Member States' national courts to address complex antitrust issues. If SAMR were granted such expert advice power, there would be a second pair of eyes to contribute to foster competition neutrality in courts.

To conclude, as the trend of China's economic development, SOEs playing a critical role has continued.[72] The Judiciary's SOE-friendly approach in private antitrust litigation is unable to have sudden changes due to China's political business culture. The AML 2022 does not seem to play a role to remedy such approach, and therefore the AML abuse of dominant position provisions will be continuously sidelined in private antitrust actions taken by private enterprises against SOEs, leading to an unachievable goal for the Judiciary in the near future – the realisation of competition neutrality in China's courts.

[72]. *See* in general, Ross Garnaut, Ligang Song & Cai Fang (eds), *China's 40 Years of Reform and Development 1978-2018* (Australian National University Press 2018).