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Legitimacy and effectiveness concerns in China's private antitrust enforcement regime: a comparative analysis with the EU and US regimes

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ABSTRACT

The year 2007 heralded a major advance in China's entry to the global economy's rules-based marketplace. Its *Anti-Monopoly Law 2007* (*AML 2007*) taking inspiration from European Union (EU) antitrust concepts contained internationally familiar key antitrust prohibitions. It appeared to satisfy key benchmarks, which any credible antitrust enforcement system should exhibit, namely Legitimacy and Effectiveness. However, in this original contribution, analysing 14 years of leading case law, the authors identify several key persistent Legitimacy and Effectiveness issues which arise when private parties attempt antitrust enforcement through the courts. On key issues such as: (i) Compensation awards inadequacy; (ii) Lack of rights for indirect purchasers; (iii) Absence of a passing-on defence; and (iv) Limitations of collective litigation mechanisms, deficiencies arising in each of these four areas are identified and analysed. Pathways to reform are set out. Comparative analysis with the corresponding EU and US jurisprudence is undertaken throughout, to illuminate the contrast in treatment for antitrust litigants facing similar antitrust situations. Recently enacted reform legislation (*AML 2022*) does not remedy the antitrust protection concerns identified by the authors. Private parties seeking antitrust redress in China will therefore continue to have weaker remedies in antitrust enforcement cases, in contrast with their EU and US counterparts. The absence of comprehensive reform means that Legitimacy and Effectiveness deficiencies will continue to undermine legal protection for China's private antitrust enforcement litigants. Furthermore, the research demonstrates how norm adoption on its own cannot raise the propect of better outcomes, unless accompanied by corresponding evolution in the provision of more robust enforcement rights and remedies for antitrust litigants, as well as evolution in judicial interpretation to support antitrust norms acceptance.

KEYWORDS: China Anti-Monopoly Law, Private antitrust enforcement, Clayton Act, Antitrust Damages Directive, Indirect purchasers, Passing-on defence, Collective redress, Antitrust compensation
JEL CLASSIFICATIONS: K21

I. INTRODUCTION

Enacted in 2007, China's *Anti-Monopoly Law of China 2007*[1] (AML) echoed significant features inspired by EU antitrust norms[2] and merger control regime, along with elements arising from World Trade Organization (WTO) accession requirements.[3] However, the AML regime also contained four significant lacunae[4] placing private antitrust litigants in China in an inferior position to that enjoyed by their EU and US counterparts. This article highlights the impact of these ongoing deficiencies by examining key private antitrust litigation enforcement mechanisms[5] in China's antitrust case law, and showing how judicial interpretation and application of key provisions of the AML and the Civil Procedure Law (CPL)[6] demonstrate that China's private antitrust enforcement regime lacks two key qualities, which any credible antitrust regime should possess, namely effectiveness and legitimacy.[7] To demonstrate these concerns, the authors also consider how the State Administration for Market Regulation (SAMR[8]) *2020 AML reform proposals*,[9] which led to the enactment of the *AML 2022*, which replaces the *AML 2007*, continues to leave unaddressed the four key Lacunae in the AML private enforcement regime, further aggravating

[1] *The AML 2007*, China's first competition law, was enacted in 2007 and came into force on 1 August 2008. It has been replaced by successor legislation, the *AML 2022*, which came into force on 1 August 2022. References to 'AML' in this article include the original *AML 2007* and its 2022 successor legislation, unless otherwise stated.

[2] Many AML elements are based on EU antitrust concepts and prohibitions, such as price or market sharing cartels or abuse of dominance (arts 101 and 102 TFEU (The Treaty on the Functioning of the European Union [2012] OJ C326): Giacomo Di Federico, 'The New Anti-Monopoly Law in China from a European Perspective' (2009) 32 World Competition 249.

[3] The addition of a modern domestic competition law, namely the *AML 2007*, was enacted by China in order to fulfil commitments made at the time of WTO accession in 2001: Xiaoye Wang, 'China's Accession to the WTO and the Drafting of the Antimonopoly Law in China' (2003) 49 Chinese JL 9.

[4] In terms of making private antitrust enforcement more effective in China, the AML was silent on four critical key questions of: providing full compensation, rather than inadequate compensation, to plaintiffs (Lacuna 1); granting a right to sue to indirect purchasers (Lacuna 2); the lack of a passing-on defence to avoid overcompensation (Lacuna 3); and provision of more robust collective litigation mechanisms (Lacuna 4).

[5] This article focuses on cases taken by private litigants (consumers and private enterprises) in private antitrust court proceedings rather than public enforcement efforts by the authorities, which are well covered in the existing literature: eg, 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* (Springer 2016) 135–48.

[6] *The Civil Procedure Law of China 2017* ('CPL') is used to ground private antitrust enforcement actions.

[7] The concepts of effectiveness and legitimacy are discussed in detail below in the next section.

[8] 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.

[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 January 2020) ('*SAMR 2020 AML Proposals*') set out the AML reform proposals. However, the four key lacunae in the AML private antitrust enforcement regime examined in this article did not feature at all in SAMR's reform proposals, nor in the subsequently enacted *AML 2022*.

effectiveness and legitimacy concerns. Apt comparisons will also be made with equivalent elements of the EU and US private antitrust enforcement regimes where appropriate, to further highlight AML effectiveness and legitimacy concerns.

A. Background to Legitimacy and Effectiveness concerns

In its *2020 AML reform proposals*, SAMR proposed a number of reforms, carried forward in the *AML 2022* in five areas: first, the AML was strengthened in order to make it clear that the AML has primacy over industrial policy priorities[10]; secondly, SAMR proposed that regional administrative authorities must cease protecting local monopolies by way of anticompetitive administrative measures[11]; thirdly, proposals were advanced for improving merger control[12]; fourthly, proposals were put forward to introduce a criminal cartel offence in China for the first time[13]; and, fifthly, proposals were made to align the AML to antitrust challenges emerging in digital markets.[14] While the above AML reforms are to be welcomed, all are linked to the public enforcement of antitrust in one way or another. Regrettably, however, there was no mention in the 2020 reform proposals or in the consequent *AML 2022* of any reform being undertaken in the four critical private antitrust enforcement lacunae identified by the authors.[15]

This article will demonstrate how the continuing failure to reform these four key lacunae[16] in China's AML calls into question the Effectiveness and Legitimacy of China's private antitrust enforcement landscape. Without reform in these four key areas, China's consumers and private enterprises will continue to be unable to take effective private antitrust enforcement action against anticompetitive conduct, whether against China's all-powerful State-Owned Enterprises (SOEs), or its mega private corporations like Alibaba (Amazon's equivalent) and Tencent (Meta's equivalent). In the absence of such reform, the AML will continue to be dogged by the provision of **ineffective** remedies in *private antitrust enforcement actions*, thereby calling into question the very legitimacy of the AML itself.

B. Antitrust Effectiveness and Legitimacy in China

Before examining the four deficiencies in the private antitrust enforcement regime that the *AML 2022* left, unaddressed, first we briefly explain why the two concepts of Effectiveness and Legitimacy are appropriate for undertaking this research. China acceded to the WTO in 2001 after long and tortuous negotiations during the preceding decade.[17] As an accession State, it agreed to enact for the first time antitrust

[10] Because neither the China system of government nor judicial practice observed the requirement for the *AML 2007* to be accorded primacy over government industrial policies and the commercial interests of SOEs, SAMR sought a restatement to be inserted into the *AML 2022* to make it clear that respect for antitrust must be accorded precedence over industrial policies: AML 2022, art 4.

[11] AML 2022, art 5.

[12] AML 2022, art 26.

[13] AML 2022, art 67.

[14] AML 2022, art 22

[15] See n 4.

[16] See further below in Lacuna 4.B 'Effectiveness and Legitimacy: the CPL Article 54 collective action—comparison with the EU 'opt-in' action' section.

[17] WTO, 'WTO Successfully Concludes Negotiations on China's Entry' (17 September 2001) Press/243.

protection norms and antitrust remedies/enforcement mechanisms.[18] In this regard, China, just like over 100 other countries around the world, chose to adopt EU-style rather than US-style antitrust legislation, by enacting the *AML 2007* using EU-familiar language to prohibit price-fixing, market sharing, and abuses of dominance by monopolies, meeting key WTO obligations.[19]

China choosing EU-style antitrust norms in preference to choosing adoption of US-style antitrust norms was not unexpected. This is because for many developing (and indeed modern) countries, EU antitrust norms are regarded as more suitable for adaption to local political and economic conditions because they accommodate multiple factors[20] other than merely advancement of 'consumer welfare' (the US approach). Secondly, adopting EU-style norms helps non-EU States such as China to be more 'oven-ready' to do business with the EU under EU regional and bilateral trade agreements with non-Member States.[21] That the EU-style antitrust prohibitions were suitable for adoption by China has been confirmed by the growing number of fines successfully imposed by SAMR, applying the AML, in recent public antitrust enforcement actions in China. For example, in 2021 alone, SAMR successfully imposed fines of over USD 3.3 billion against private and public companies operating in China's massive consumer market,[22] condemning forms of anticompetitive market sharing, price-fixing, and abuses of dominance similar to those occurring in Western markets.

However, where a country adopts modern antitrust norms, it is essential that the remedies that the system provides are effective, and furthermore that those charged with interpreting and applying antitrust laws do so in a way that recognizes their legitimacy. For an antitrust system to be credible, we should expect to observe mechanisms that allow for effective remedies to be sought, and granted, not only to public enforcement authorities but also to private citizens who suffer from antitrust

[18] Selene Ko, 'An Introduction to Chinese Legislation' (2004) 3 Washington U Global Stud LR 267.

[19] Robert D Anderson and others, 'Competition Policy, Trade and the Global Economy' WTO Economic Research and Statistics Division Staff Working Paper ERSD-2018-12 (31 October 2018).

[20] For example, EU antitrust accommodates protection of SMEs, market integration, as well as consumer welfare: major jurisdictions like China and India find the adoption of EU antitrust norms and regulatory structures more conducive and flexible for local conditions in their domestic markets. See further, Anu Bradford and others, 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16 JELS 731 for an excellent empirical analysis showing how (for example) in 1960, 74 per cent of countries' competition laws resembled neither the USA or EU, but by 2010 that number had fallen to 24 per cent, with a large increase in the proportion of countries whose antitrust laws resemble the EU: by 2010, 51 per cent of countries had laws that resemble the EU, whereas in contrast, while 22 per cent of countries had antitrust laws that resembled the USA in 1960, that number had dwindled to 10 per cent by 2010. Furthermore, of 17 countries who had competition law regimes with higher correlations to the EU regime than the USA in 1985, 59 did so by 2000; by 2010 only 22 countries had higher correlations to US antitrust law, whereas 71 regimes had higher correlations to the EU.

[21] ibid.

[22] In 2021 SAMR fined Alibaba USD 2.8 billion for abuse of dominant position, and Meituan (China's equivalent of Uber Eat) USD 530 million: see 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]; 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 74 号 [SAMR's Decision on Administrative Punishment, No 74 of 2021]; *see also* Lishuang Lin, '2021 年官方共查处垄断案件 175 件 罚没金额 235.92 亿' ['175 Monopoly Cases Investigated in 2021 Imposing a Fine of RMB23.592 Billion'] *Beijing Youth Daily Financial News* (China, 8 June 2022) <https://baijiahao.baidu.com/s?id=1735046085530464187&wfr=spider&for=pc> accessed 3 December 2022.

violations (Effectiveness[23]). Further, we should also observe antitrust law being interpreted and applied correctly by expert bodies (eg, courts), rather than not being enforced, by the courts when the citizen seeks the protection of the law (Legitimacy[24]).

The EU recognized this problem by enacting the 2014 EU Antitrust Damages Directive, where it belatedly recognized that the overall enforcement of the EU competition rules is best guaranteed through complementary public and private antitrust enforcement, recognizing that for antitrust enforcement action and remedies to be effective, they must be effective not only in the public but also in the private sphere.[25] While research shows that there is ample successful public antitrust AML enforcement activity in China,[26] there has not been any corresponding increase in successful private enforcement efforts of the AML in China.[27] We shall see how this raises antitrust effectiveness concerns for private citizens seeking protection of the AML, and additionally raises concerns about how the courts view the legitimacy of the AML itself as a fundamental norm. What our analysis below will show is that the barrier to enforcement of the AML by private parties is based on two key factors: first, the *AML 2022* fails to address several key features,[28] which any credible antitrust enforcement system should possess in order to provide effective remedies, and secondly the situation is further aggravated by judicial action that raises major effectiveness and legitimacy concerns when private parties attempt antitrust enforcement.

Before turning to analyse these questions from the perspectives of effectiveness and legitimacy, brief consideration is given at this point to the question of whether the burden of proof constitutes a significant barrier to antitrust litigants in China. We have concluded that it does not raise major issues for antitrust litigants for the following reasons. First, indirect purchasers (ie, purchasers affected by antitrust activity who do not have a direct contractual relationship with the infringing party) find their problem is not with the burden of proof but rather with the fact that China's civil procedure law does not confer a right to sue on indirect purchasers in the first place[29] because the *Civil Procedure Law 2017* does not permit such action.[30] Secondly, turning to dominance cases, these make up about 90 per cent of private antitrust cases taken in China[31] and in such cases the burden of proof shifts onto the defendants

[23] Franz Kronthaler, *Effectiveness of Competition Law: A Panel Data Analysis* (Halle Institute for Economic Research 2007).

[24] 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.

[25] Commission, 'Proposal for a Directive of the European Parliament and the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and the European Union' COM (2013) 404 final, Explanatory Memorandum 1.2.

[26] SAMR, '中国反垄断执法年度报告(2021)' ['China Antitrust Enforcement Annual Report (2021)'] (8 June 2022) 2.

[27] Christopher S Yoo and others, 'Due Process in Antitrust Enforcement: Normative and Comparative Perspectives' (2020) 94 S California LR 843.

[28] The four lacunae: see n 4.

[29] See further below in 'Lacuna 2' section.

[30] CPL, art 119.

[31] Zhan Hao, Song Ying and Yang Zhan, 'A New Era Comes–Highlights of the Anti-Monopoly Law of China in 2018' (Anjie Law Firm 2019) <www.anjielaw.com/uploads/soft/190201/1-1Z2011P339.pdf> last accessed on 3 December 2022.

once dominance has been established.[32] Thirdly, the introduction of public interest litigation for the first time in *China's AML 2022*[33] allows antitrust plaintiffs taking follow-on actions to rely on earlier infringement findings made by public enforcement authorities when they take follow-on lawsuits seeking compensation, so that they will not face significant burden of proof issues.[34] Therefore, for the forgoing reasons, the burden of proof is not a major focus of this article because it does not raise major issues for litigants compared to those raised by the four lacunae, which we are now about to consider. But before that, the concepts of Effectiveness and Legitimacy must be considered and contextualized.

1. Effectiveness

As a general starting point, Effectiveness means that in a credible antitrust system, we should expect to observe mechanisms that allow for effective remedies to be sought, and granted, to those who suffer from antitrust violations. Effectiveness of the AML's private enforcement regime[35] can be considered from several interrelated perspectives, such as sufficiency of compensation and legal costs; deterrence; degree of restriction on who can take private action; numbers of successful awards versus numbers of cases, etc. For the purposes of this study, several such Effectiveness lenses shall be applied, with the degree of compensation and degree of awarding legal costs a primary lens through which to study the question of private antitrust enforcement Effectiveness.[36] On the question of Effectiveness (of the AML) in terms of sufficiency of compensation, it shall be seen later below[37] how China's regime on the award of compensation and legal costs in private antitrust actions raises particular concerns, which makes the taking of private antitrust litigation a highly uncertain venture. Both Crane and Juška have separately considered the importance of compensation sufficiency as a key criterion for the Effectiveness of a private antitrust enforcement regime, concluding that Effectiveness of compensation could be examined by examining whether all genuine victims could be compensated, and whether the compensation covers legal costs.[38] Awards made by courts in private antitrust enforcement actions in China taken by private citizens do not follow the 'full' compensation approach which the EU requires (namely full compensation is defined to include actual losses, loss of profits, interest, and costs of litigation to cover the injured party's losses),[39] instead often providing compensation that is more tokenistic

[32] The Supreme Court's 2012 Judicial Interpretation on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conduct [2012] No 5 ('Judicial Interpretation No 5'), art 8; see also further below in 'Lacuna 1' section.

[33] AML 2022, art 60(2).

[34] See further below in 'Lacuna 4' section.

[35] Jingyuan Ma, 'The Enforcement of Competition Law – A Behavioural Law and Economic Perspective' in Jingyuan Ma (ed), *Competition Law in China: A Law and Economic Perspective* (Springer 2020) 227.

[36] See further below in 'Lacuna 1' section.

[37] ibid.

[38] Žygimantas Juška, 'The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement' (2017) 62 Antitrust Bull 603; Daniel A Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 Vand L Rev 675.

[39] Dir 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 EU OJ L349/01 (5 December 2014) ('Antitrust Damages Directive'), art 3(2).

rather than being adequate in scale. As will be seen later below, not only is the level of compensation awarded by courts in private antitrust actions in China inadequate, but also legal costs awarded are frequently insufficient.

Another Effectiveness measure can be whether all antitrust victims have the right of action? In China, antitrust victims falling into the category of 'indirect purchasers' have no right to sue, raising another major Effectiveness 'red flag'.[40] While it could be argued that China is no different in this respect to another major jurisdiction, the USA, which does not recognize the right to sue on the part of indirect purchasers either, a crucial difference between China's antitrust enforcement regime and the US regime is that the US Supreme Court has recognized a number of clear exceptions whereby certain categories of indirect purchasers are permitted to sue[41] (and for comparative purposes it is noteworthy that the EU Antitrust Damages Directive makes it clear that indirect purchasers in the EU have right of suit without restriction).

Effectiveness can also be looked at from the point of view of deterrence[42]: deterrence could be examined by examining whether the courts actively entertain litigation and whether there are healthy numbers in terms of 'successful' actions? However, we shall see how the number of successful cases in China private antitrust enforcement can be counted on one hand, compared to the hundreds of cases taken to date.[43] Deterrence can also be assessed by reference to the US measure of 'triple damages'[44] in successful antitrust actions, clearly intended to have deterrent effect: whereas by comparison, the low levels of compensation awarded in China in private antitrust enforcement actions cannot be said to constitute a violation deterrence.

Effectiveness can also be assessed when we examine the taking of collective enforcement action, by asking whether those who suffer losses due to anticompetitive conduct are conferred with statutory rights to seek a remedy for antitrust breach by taking action collectively on a level playing field. It shall be seen how collective antitrust actions in China are not attractive for a variety of reasons, including uncertainty surrounding compensation and legal costs which make undertaking such action potentially onerous.[45]

A further means by which to measure Effectiveness of a private antitrust enforcement regime is to ask, in terms of rights of defence, whether an antitrust enforcement regime avoids the occurrence of overcompensation by the operation of a passing-on defence.[46] China does not provide for a passing-on defence.[47]

[40] See further below in 'Lacuna 2' section.

[41] Eg, *Kansas v Utilicorp United* (1990) 497 US 199, paras 110 and 218.

[42] ibid, see also Bineswaree Bolaky, 'The Effectiveness of Competition Law in Promoting Economic Development' (2013) 5 Intl J Econ Fin Stud 33.

[43] An examination of over 700 private antitrust enforcement actions initiated in the courts between 2008 and 2019, shows an incredibly low success rate—less than 1 per cent (see below section on Lacuna 1.C 'Low success rates and reasons for rejecton highlight Legitimacy concerns').

[44] The Clayton Act 1914, 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes'. 15 October 1914 730: L.63-212, s 15(a).

[45] See further below in Lacuna 4.A 'Effectiveness and Legitimacy: the CPL Article 52 joint action and Article 53 representative action' section.

[46] 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 Eur Compet L Pract 226.

[47] See further below in 'Lacuna 3' section.

2. Legitimacy

Legitimacy of private antitrust enforcement under the AML shall be considered from the perspective of legal rules and how they are implemented by the courts.[48] In other words, whether antitrust legal rules are enforced or not. For example, when we examine the different elements that constitute compensation awarded in private antitrust actions in China, it becomes evident that the elements courts award compensation for do not properly reflect the several elements which the Supreme Court has earlier indicated compensation awards should cover.[49] This raises a Legitimacy 'red flag' immediately from the perspective of legislative rules which have been judicially interpreted at the highest judicial level, but yet such interpretation has not been followed in full by the courts when making compensation award decisions. What our study shall demonstrate is that the AML therefore fails a key Legitimacy test: namely, the courts repeatedly sideline the enforcement and application of the AML, whenever violation of the AML's provisions are invoked by private litigants in China's courts,[50] thereby giving rise to the conclusion that the AML is not regarded as a set of 'non-negotiable' norms by the judiciary. The question of Legitimacy is therefore an acute one, when considered against the long-standing track record of China's courts, which invariably accord precedence to the provisions of *China's Civil Procedure Law* ('CPL') in antitrust litigation, thereby effectively sidelining the AML's application.[51]

Another Legitimacy red flag arises, again via the lens of whether the Law is enforced or not in the courts, because of conflicting provisions in the CPL and the AML concerning whether indirect purchasers have the right to sue in private litigation actions. The failure of *CPL 2017* to confer a right to sue on indirect purchasers poses an insurmountable obstacle for many consumer antitrust victims in China when they seek to take private enforcement action. This is because most consumers or businesses will hold the status of being 'indirect' purchasers, ie, many will purchase from an intermediary, rather than from the party who was the source of the

[48] Legitimacy of private antitrust enforcement could be considered from many other perspectives as well, for example from the perspective of 'output legitimacy' (see Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' (2014) European University Institute Working Paper L. 2014/01, 6–8, asking eg, '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', etc). However, for the purposes of this article, Legitimacy shall not be considered from the perspective of such 'output legitimacy' simply because taking legal action in courts is not considered a dispute resolution method of first choice by potential litigants in China if there are other ways to solve a dispute. Legitimacy can also be looked at from the perspective of economic activities in the face of arbitrary state interference in the economy (see William E Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement' (2001) 77 Chi-Kent LR 265) but that is not suitable for this research because this article focuses on private antitrust enforcement rather than State interference in the economy.

[49] See further below in 'Lacuna 1' section.

[50] There have been only three 'successful' consumer-led private antitrust cases since the AML came into force in 2008, ie, (i) Judgment no 98 *Wu Xiaoqin v Shaanxi Radio and Television Network Media (Group) Co, Ltd*, Supreme People's Court, 2016 [*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*] ('*Wu Xiaoqin v Shaanxi TV*'); (ii) Judgment no 1190 *Wu Zongqu v Yongfu Water*, Guangxi Autonomous Region High People's Court, 2018 [*吴宗区诉永福县供水公司滥用市场支配地位纠纷案*]; (iii) Judgment no 1191 *Wu Zongli v Yongfu Water*, Guangxi Autonomous Region High People's Court, 2018 [*吴宗礼诉永福县供水公司滥用市场支配地位纠纷案*].

[51] See judgments considered below in 'Lacunae 1–4' sections.

anticompetitive conduct. Article 119 of the CPL appears to only permit consumers who have a 'direct interest'[52] to seek compensation for breach of civil law. This is in marked contrast to the Judicial Interpretation of the AML by the Supreme Court in 2012,[53] which recognized that suit could be initiated for losses caused by antitrust conduct, without making any apparent distinction between direct and indirect purchasers.[54] This lack of enforcement symmetry (ie, who can sue?) between the Supreme Court's AML Judicial Interpretation and the CPL's Article 119 raises Legitimacy concerns par excellence and is considered below in detail below.[55]

On the upside, there has been one potential Legitimacy development with the enactment of the *AML 2022*[56]: a public interest litigation mechanism has been provided for antitrust litigants for the first time. This is akin to the US 'class action' and EU opt-out action. It was not provided under the *AML 2007*[57] but has now been provided for in the successor *AML 2022*. The question whether it shall be useful for those seeking private antitrust enforcement remains open to question because the *AML 2022* specifies that the applicants are to be confined to parties who exercise public power, rather than private citizens one would expect to see leading a class action. This shall be discussed further in Lacuna 4 below.

3. *The four lacunae—Effectiveness and Legitimacy issues*

The four key lacunae arising for examination are as follows:

First Lacuna: China does not adopt a 'full-compensation' approach in antitrust actions initiated by private litigants.[58] Full compensation in the EU means that where the applicant's case is proven, the court should award compensation to reflect the applicants' actual loss, loss of profits, and interest.[59] In the USA the courts can go even further, awarding triple damages as a deterrent to the antitrust violator.[60] However, we shall see that in China, in successful cases, awards often cover actual

[52] CPL, art 119: 'The following conditions must be met when a lawsuit is brought: (1) the plaintiff must be a citizen, legal person or any other organisation that has a direct interest in the case […]'.

[53] Judicial Interpretation No 5, art 1.

[54] Sébastien J Evrard, 'Civil Antitrust Litigation in China' (2016) May International Bar Association: takes the view that any AML violation victims (including indirect purchasers) have the right to sue based on the 2012 Judicial Interpretation.

[55] See 'Lacuna 2' section.

[56] CPL, arts 52–55.

[57] Chen Yunliang, '反垄断民事公益诉讼：消费者遭受垄断损害的救济之路' [Antitrust Civil Public Interest Litigation: The Way to Compensate Consumers' Monopoly Damages] (2018) 5 Modern L Sci 130.

[58] As of the time of writing there have been eight successful antitrust litigation cases, which we categorize as per the following *compensation* outcomes: (i) one plaintiff enterprise was awarded no compensation (*Lou Binglin* 2013); (ii) two plaintiffs (*Healthcare* 2018 and *Wu Xiaoqin* 2016) were awarded only reimbursement of what they paid under the anticompetitive contract; (iii) three plaintiffs were awarded less than what they claimed: one plaintiff (*Rui Bang* 2012) was awarded 0.37 per cent of the claimed damages, and two consumer plaintiffs (*Wu Zongqu* 2018 and *Wu Zongli* 2018) were awarded only reimbursement of what they paid under the anticompetitive contract plus interest and one-fifth of claimed legal costs; (iv) the other two (*Yangtze River* 2019 and *Huawei* 2013) plaintiffs were awarded only reimbursement of what they paid under the anticompetitive contract and claimed legal costs: see further discussion below and in Dermot Cahill and Jing Wang, 'Addressing Legitimacy Concerns in Antitrust Private Litigation involving China's State-Owned Enterprises' (2022) 45(1) World Comp 75, 105.

[59] Antitrust Damages Directive, art 3(2).

[60] The Clayton Act 1914, s 15(a).

loss only, and does not (unlike the EU model) award loss of profits or interest. This deficiency is aggravated by the courts in China not awarding full legal costs to successful antitrust litigants either (often awarding either no legal costs, or only a small fraction of legal costs claimed). Furthermore, the compensation award in China contains no deterrence element (such as the US antitrust triple damages award), so on several grounds the compensation approach taken by the courts in China raises both Effectiveness and Legitimacy concerns.[61]

Second Lacuna: China's laws do not confer antitrust enforcement rights on indirect purchasers,[62] unlike the EU for example where EU harmonization legislation has granted indirect purchasers the right to seek compensation for antitrust violations since 2014.[63] An indirect purchaser is someone who is adversely affected by the illegal activities perpetrated by antitrust actors, but does not have a direct contractual relationship with the violators themselves, for example because they purchase goods the subject of antitrust activity from an intermediary who is not a party to the illegal activity. This denies such parties of the right to seek compensation. The *AML 2022* does not remedy this obvious gap. It remains silent on this key issue, thereby raising further Effectiveness and Legitimacy concerns about the AML and its 'reform' intentions.

Third Lacuna: Neither the AML nor the CPL offer the prospect of any 'passing-on' defence provisions to allow defendants avoid having to overcompensate direct purchaser litigants,[64] thereby raising further AML Legitimacy concerns, unlike as is the case in the EU (and many of the States in the USA).

Fourth Lacuna: The CPL's collective litigation regime[65] lacks Effectiveness, because of the very limited use of collective litigation to date, and further because the public interest antitrust action, recently introduced by the *AML 2022*[66] for the first time, appears to be confined to applicants exercising public powers, rather than private citizens themselves as one would expect in a class action in EU and USA.[67] Again this is markedly in contrast to EU/US approaches to public interest antitrust litigation.[68]

II. LACUNA 1: THE 'FULL' VERSUS 'LIMITED' COMPENSATION APPROACH

A. China's compensation approach inhibits AML Legitimacy and Effectiveness

The EU and USA offer different antitrust violation compensation models, yet both can be said to exhibit the quality of Effectiveness and Legitimacy in the compensation

[61] See further below in 'Lacuna 1' section.

[62] CPL, art 119 precludes indirect purchasers, which consumers shall be in most situations, from initiating suit, because they have no 'direct interest' as per art 119. See further below in 'Lacuna 2' section.

[63] Antitrust Damages Directive, arts 12 and 14.

[64] Antitrust Damages Directive, art 12.

[65] AML 2022, art 60(2).

[66] CPL, arts 52–55.

[67] See further below in 'Lacuna 4.C' 'Effectiveness and Legitimacy: the CPL Article 55 and AML 2022 Article 60(2) public interest action'.

[68] For example, the USA provides opt-out class action litigation for antitrust enforcement; the EU permits Member States to offer opt-in and/or opt-out collective actions: see below section on 'Lacuna 4'.

context: Effectiveness because both systems require the courts to grant remedies that compensate in full for damage flowing from antitrust violations[69]; and Legitimacy because the courts will grant the remedies provided for in the relevant applicable legislation to enforce the applicable antitrust legislation.

China, in stark contrast, only adopts a partial compensation approach, which does not bear the hallmark of Effectiveness. Although Article 60(1) of the *AML 2022* stipulates that antitrust infringers must compensate those whom their actions harm,[70] when China's private litigants actually seek compensation for antitrust violations, they find compensation awards by the courts are confined to compensation for actual loss. This follows from the Supreme Court 2012 Judicial Interpretation No 5 pertaining to the AML.[71]

Furthermore, successful awards tend to be accompanied by inadequate reimbursement of legal costs, which constitutes a major disincentive for antitrust litigants as actions are complex, requiring intensive preparations.[72] This raises a Legitimacy question because the existing jurisprudence (considered below) appears to fail to not properly implement the Supreme Court's 2012 Judicial Interpretation No 5 concerning legal costs. China's courts tend not to award costs in antitrust cases, and where they do, the court typically awards a small percentage of the plaintiff's claimed costs,[73] even though the Judicial Interpretation pronounced that 'upon the request of the plaintiff, the Court **may** include reasonable expenses paid by the plaintiff for investigation and prohibition of monopolistic conduct, in the compensation for damages'.[74]

Demonstrating the disconnection between the 2012 Judicial Interpretation and judicial practice, the authors have found only two judgments in which a *consumer plaintiff* was awarded legal costs (with successful cases on the merits of the action being rare in any event), namely the 2018 case of *Wu Zongqu v Yongfu Water*[75] and *Wu Zongli v Yongfu Water*.[76] Even then, the Court made a somewhat bizarre decision that calls into question the Legitimacy of the courts' provision for costs. Mr Wu Zongqu and Mr Wu Zongli, separate plaintiffs, were new customers of Yongfu Water in Guilin, a city in southern China. They individually sued Yongfu Water (the only

[69] After many years toying with the issue the EU adopted a 'full' compensation approach in 2014 (Antitrust Damages Directive, art 3). The USA permits triple damages recovery (The Clayton Act 1914, sec 15(a)).

[70] AML 2022, art 60(1) provides that '[w]here any loss was caused by a business operator's monopolistic conduct to other entities and individuals, the business operator shall stop the infringement; return to the original state; assume the civil liabilities.'

[71] For example, see the *Wu Zongqu v Yongfu Water* (2018); and the *Wu Zongli v Yongfu Water* (2018) and *Wu Xiaoqin v Shaanxi TV* (2016) cases considered immediately below.

[72] Art 14 of the Supreme Court's 2012 Judicial Interpretation No 5 mandates the award of compensation. China's courts tend to confine awards on the matter of compensation to successful antitrust plaintiffs to actual loss only (which gives rise to Legitimacy issues in cases where the loss of profits or interest are not also awarded: see further below). (Note that although the 2012 Judicial Interpretation No 5 was revised in 2020, the revision made therein were not relevant to this issue, and so has no bearing on the current discussion).

[73] See n 58.

[74] Judicial Interpretation [2012] No 5, art 14(2).

[75] *Wu Zongqu v Yongfu Water* (2018). In addition, for an example of where a consumer was awarded a favourable verdict on the substantive competition issue (a rare occurrence in itself) but yet was not awarded their costs, see *Wu Xiaoqin v Shaanxi TV* (2016).

[76] *Wu Zongli v Yongfu Water* (2018); see further in Cahill and Wang (n 58) 105–06.

water supplier in their area) alleging abuse of its dominant position[77] by charging them unfairly high prices for water meter installation services when making connection to the public water supply. The plaintiffs were awarded their actual losses (ie, cost of water meters and installation services) and interest (6 per cent) on the actual losses, but only one-fifth of their legal costs, respectively. These cases illustrate how the remedy lacks Legitimacy and Effectiveness because, despite the 2012 Judicial Interpretation as to the awarding of costs, only actual loss was compensated, with costs being largely ignored (apart from allowing only one-fifth costs recovery).[78]

Our research has also uncovered another rare example of a successful private antitrust enforcement action, but on this occasion with no award as to costs: the 2016 case of *Wu Xiaoqin v Shaanxi TV*.[79] The Supreme Court found Shaanxi TV abused its dominant position by forcing consumer Wu to pay for services he did not require,[80] namely 3 months digital TV fees (RMB 15 or USD$2) on top of the basic television maintenance fee (RMB 75), without giving him any option whether to accept the service's digital element. Wu was awarded RMB 15 compensation based on his actual loss. This level of award of compensation falls far short of (for example) the EU's full compensation model, and is further aggravated by no award as to costs for costs incurred by Wu in mounting his 4-year antitrust enforcement litigation.[81] Failure to award costs raises an Effectiveness issue and can be contrasted with, for example, the US model under which reasonable costs are awarded to the winning party in antitrust cases.[82]

B. Comparison with the US and EU models

In comparison, in the USA and EU the position is much different from China. For example, in the USA the *Clayton Act 1914* provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor […] and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee'.[83] The Clayton Act's treble damages regime serves two purposes, neither of which are recognized

[77] AML 2022, art 22(1): 'A business operator with a dominant position shall not abuse its dominant position […] selling commodities at unfairly high prices.'

[78] In private enforcement cases where the plaintiff is a *private enterprise* the outcome on award on legal costs can be variable: for example, in *Huawei v IDC* (2013) a successful plaintiff was awarded full legal costs, as was the plaintiff in *Yangtze River Pharmaceutical Group* (2019), though in other successful enforcement actions where an enterprise was plaintiff, the court awarded no legal costs: *see further* n 58 at pages 84 and 105.

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

[80] Contrary to AML 2022, art 22(5) which prohibits abusive tying of services.

[81] Compensation in administrative antitrust litigation (ie, antitrust litigation against a government department) is likely to yield even less 'generous' compensation in a successful case: see eg, Judgment No 228 *Shenzhen Siweier Technology Ltd. v Guangdong Department of Education* where Guangdong High Court in 2015 held that an arrangement between the Department of Education and a third party violated the AML (the first successful AML case against an administrative monopoly in China), yet no compensation was awarded, even though the plaintiff's business was clearly restricted by the illegal arrangement. See commentary by 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, 756.

[82] The Clayton Act 1914, s 4.

[83] The Clayton Act 1914, s 15(a).

by the weaker compensation awardable under China's AML regime: namely, first, deterrence (to other enterprises who might be violation-minded) and secondly, recognition of the effort required to provide proof of antitrust infringement.[84] In the EU 'full compensation' in private antitrust enforcement actions, while not including a punitive damages element like its US counterpart,[85] does include recovery of several other elements, namely actual loss, loss of profits, and interest on the damage.[86] Although the EU model can be criticized for not providing a completely comprehensive model on several grounds (eg, lacking a punitive[87] damages element[88]; not harmonizing different EU Member States court procedural rules,[89] etc), those missing elements can be explained by its far more aggressive public enforcement imposition of fines model (compared to the US model), and the need to prevent overcompensation occurring.[90] However in its totality, by compensating the actual loss, loss of profits, and interest in antitrust enforcement cases, the EU model bears the hallmark of Legitimacy compared to the China model, which by contrast sees China's courts largely confine the award of compensation to compensation for the actual loss only, despite the 2012 Supreme Court Judicial Interpretation going further (as discussed earlier above). This limited view of what compensation should entail, deters private litigants from taking antitrust compensation actions, because individual recoverable losses may be small, compared to the cost of actually undertaking the litigation.[91] While the court has a discretion whether to award the costs of case preparation (and usually does not so award), predictability on this element can be very significant for plaintiffs. As a result, we conclude that China's courts limiting of awards to solely actual losses is nowhere as comprehensive as either the EU full compensation requirement or the US Clayton Act triple damages award.[92] This major contrast between the EU/US compensation models and China's courts' limited compensation

[84] 'Private Treble Damage Antitrust Suits—Measure of Damages for Destruction of All or Part of a Business' (1967) 80(7) Harvard LR 1566, 1567; Steven B Pet, 'Preserving Antitrust Class Actions: Rule 23(B)(3) Predominance and the Goals of Private Antitrust Enforcement' (2017) 12 Va L Bus Rev 149.

[85] Andreas Stephan, 'Does the EU's Drive for Private Enforcement of Competition Law have a Coherent Purpose?' (2020) 37(1) U Queensland LJ 153. Stephan points out 'The commitment to actual damages [in the EU regime] means the incentive to bring an action remains weaker than in the US.' See also Eda Sahin, 'The (Infamous) Question of Punitive Damages in EU Competition Law' (2016) Global Compet Litig Rev 88, 91.

[86] Antitrust Damages Directive, art 3(2); Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos, 'A Panacea for Competition Law Damages Actions in the EU?' (2019) 26(4) Maastricht J Eur Comp L 480, 496.

[87] The lack of a punitive damages element in the EU is explained on the basis that public enforcement fines constitute the punitive element, and so avoids double jeopardy by not making a punitive element also feature in the private enforcement action: Stephan (n 85).

[88] Antitrust Damages Directive, art 3(3).

[89] Although recognizing the right to compensation, some of the crucial elements for the right's effectiveness are not harmonized in the Directive, eg, the fault and causation requirements for damages claims continue to be governed by national law, and may vary from State to State: Barry Rodger, Miguel Sousa Ferro and Francisco Marcos, *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018).

[90] Alison Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in M Bergström, M Iacovides and M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing 2016) 15–42.

[91] Angela HY Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?' (2015) 51 Stanford J Intl L 195, 213.

[92] AML 2022 has not remedied this long-noted weakness (see Liyang Hou, 'The Chinese Private Anti-Monopoly Enforcement still has a Long Way to Go' *Dongfang Daily* (Shanghai, 9 May 2012) A22).

approach, raises both Effectiveness and Legitimacy concerns for private antitrust enforcement compensation actions in China.

C. Low success rates and reasons for rejection highlight legitimacy concerns

Another significant Legitimacy consideration that arises in China is the low success rate of private antitrust enforcement cases in China.[93] While data on China are often neither easy to access, nor sufficiently comprehensive or detailed in its reasoning, what the authors can ascertain is the following. A 2014 survey[94] of 200 private enforcement cases taken between 2008 and 2013 (by either private enterprises or consumers) revealed that in only three cases in that period did the plaintiff succeed. In that period none were private consumers: All three successful litigants were businesses.[95] In addition, by the end of 2017, out of a further 500 private antitrust enforcement cases heard before the Court[96] (86 in 2014; 156 in 2015; 156 in 2016; 114 in 2017[97]) existing research shows that the vast majority of these cases were also largely unsuccessful.[98] The most common and usual reason for plaintiff failure given

[93] This is not due to the burden of proof barriers, but rather, can be explained by the judiciary's misapplication of core antitrust concepts to clearly established facts, which leads to the courts not drawing appropriate antitrust inferences from clearly established facts. This problem shall be discussed further below. In contrast, in antitrust litigation in the EU, the question of whether the plaintiff has met the burden of proof in an antitrust case will be determined by whether the plaintiff has produced evidence of facts which allow the court to deduce that the likely motivation of the defendant must have been to engage in illegal anticompetitive activities, which can be rebutted if the defendant can produce a countervailing argument: see Cani Fernandez, 'Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment' (2019) 10 J Eur Compet L Pract 448; Cristina Volpin, 'The Ball Is in Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Competition Law' (2014) 51 Common Market LR 1159. See also discussion on the need for judicial antitrust training in Cahill and Wang (n 58) 115–16.

[94] Competition Policy and Law Commission of China Society for World Trade Organization Studies (ed), *中国竞争法律政策研究报告 2014 [Report on Competition Law and Policy of China 2014]* (Law Press 2014) 26–27; Wang Congcong and Song Ya, 'Why did Five-Year Implementation of the AML Only Bring Slightly Over 200 Civil Anti-Monopoly Cases' *China Youth Daily* (Beijing, 29 August 2013) 7.]

[95] (i) Judgment No 6 *Beijing Rui Bang Yong He Science and Trade Co Ltd v Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd.*, Shanghai High People's Court, 2012 [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] ('*Rui Bang v Johnson & Johnson*, 2012'): the plaintiff was only awarded its (actual) losses by the court RMB 0.53m (equivalent to USD $78,000), out of a claimed RMB 14.4m (equivalent to USD $2.1m) for harm occasioned by an illegal resale price-fixing agreement; (ii) Judgment No 4325 *Lou Binglin v Beijing Aquatic Products Wholesale Industry Association*, Beijing High People's Court, 2013 [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] ('*Lou Binglin*, 2013'): the court condemned a price-fixing agreement (but no damages were awarded). (iii) Judgment No 306 *Huawei Technologies Co Ltd v InterDigital Technology Corporation, InterDigital Communications, LLC and InterDigital Corporation*, Guangdong High People's Court, 2013 [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] ('*Huawei v IDC*, 2013'): Huawei's abuse of dominance allegations were upheld (that IDC abused its dominant position in the US and China 3G patent markets by charging Huawei unfair high prices for 3G patents). Huawei was awarded RMB 20m (equivalent to USD $2.9m) for actual losses and legal costs.

[96] Ding Liang, 'Private Antitrust Litigation: China' (*DeHeng Law Firm*, 22 August 2019) <www.lexology.com/library/detail.aspx?g=7fd7b1ad-9bda-4c3e-a8b5-846ad2be5000> accessed 3 December 2022.

[97] Zhu Li, '反垄断法民事诉讼十年' ['A Decade of Private Litigation in Antitrust Law'] (*China IP News*, 28 August 2018) <http://ip.people.com.cn/n1/2018/0828/c179663-30255146.html> accessed 3 December 2022.

[98] Five plaintiff-winning cases in China's courts between 2016 and 2020 were: (i) *Wu Zongqu v Yongfu Water* (2018) and (ii) *Wu Zongli v Yongfu Water* (2018) (charging unfairly high prices); (iii) *Wu Xiaoqin v Shaanxi TV* (2016) (products not requested); (iv) *Healthcare Co Ltd v TDI* (2018) (price-fixing); (v) *Yangtze*

by the court was that the alleged anticompetitive behaviour did not diminish competition in the relevant market. However, this outcome appears highly questionable. This is because we shall see immediately below in three distinct groups of cases, how plaintiffs were able to provide clear evidence sufficient to satisfy burden of proof requirements in antitrust cases, and so render court findings to the contrary to be irrational. These judicial decisions can only be explained by the courts failure to properly apply core antitrust concepts borrowed from EU antitrust law.[99] Three groups of cases considered below provide examples to illustrate this problem of low success rates.

The first common ground on which antitrust cases appear to have been rejected was that plaintiffs failed to convince the court that the defendant(s) occupied a dominant position in the relevant market. Companies holding a market share of over 50 per cent are presumed dominant (*AML 2022*, Article 24(1)). Ordinarily a failure to prove dominance would be a reasonable ground for rejecting an abuse of dominance action. However, upon closer inspection of the cases, court findings of no dominance appear difficult to justify, especially when the courts gave no convincing reason to rebut the presumption of dominance. In the cases about to be examined, the applicants demonstrated that defendants held very high market shares, far exceeding 50 per cent, and far higher than their nearest, far smaller, competitors. Therefore, it is absurd to argue that applicants had not established dominance. For example, *Baidu* (2010) with its 73.2 per cent search engine market share was held by the Beijing High People's Court not to hold a dominant position in the search engine market in China,[100] despite its nearest only other significant competitor having a market share of only 19.6 per cent![101] Similarly, in *Yang Zhiyong v China Telecom* (2015), the defendant's 67.8 per cent market share was held by the Shanghai High People's Court not to be indicative of dominance,[102] despite China Telecom's 67.8 per cent market share dwarfing that of competitors possessing far smaller market shares (China Unicom, China Mobile, and China Railcom).[103] These court decisions confirm the view that the requirement for applicants to demonstrate dominance as a jurisdictional pre-requisite requirement is not an insurmountable burden of proof barrier for applicants in antitrust litigation in China. The problem rather is that the courts do not understand the dominance concept. Their failure to find dominance in such clearcut cases, in line with the express terms of the AML itself, can only be explained by their lack of understanding of core antitrust concepts, which in turn leads to the judges misinterpreting and misapplying the dominance concept. This results in irrational judicial decisions. They cannot be explained any other way.

River Pharmaceutical Group (2019) (unfairly high prices / imposing unfair transaction terms). The first three were consumer-led cases while the other two were business-led.

[99] Federico (n 2); see further discussion on the need for judicial antitrust training: Cahill and Wang (n 58) 115–16.

[100] Judgment No 489 *Tangshan Renren v Baidu*, Beijing High People's Court, 2010 [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].

[101] Google was the holder of 19.6 per cent and it exited the market a few years later, leaving Baidu to dominate the market since as by far the largest player: see Hongmei Zhou, '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* (Beijing, 26 January 2011).

[102] Judgment No 23 *Yang Zhiyong v China Telecom*, Shanghai High People's Court, 2015 [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].

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

Moreover, a knock-on consequence of the courts failing to find dominance (when clearly it has been established by very high market shares, as per the AML) is that the burden of proof is prevented from shifting onto the defendants.[104] This aggravates the consequences of the court misapplying the dominance concept. In the cases examined above, it was not the burden of proof that caused the plaintiffs to fail to establish dominance, but rather the courts failure to make a dominance-finding in circumstances where it was proven that large players held very high markets share, in markets where their competitors held very low market shares and possessed no counterbalancing market power leverage over the larger player. In contrast, in the EU, market shares at these high levels would be found to confer dominance in similar circumstances.[105]

The second ground commonly advanced to reject AML cases is that no compelling evidence was advanced to prove that abusive behaviour had been practiced by a dominant player. However, this apparently acceptable rejection ground becomes less so when the objectionable practices concern serious matters such as discriminatory pricing[106] or refusal to provide a service without objective justification,[107] where such factual instances were easy for the plaintiffs to prove.

The third ground for rejecting AML cases was seen in *Qihoo 360 v Tencent (2013)*[108] where Tencent was held to have advanced 'justifiable' reason(s) for its anticompetitive behaviour when it 'forced' customers to delete Qihoo's antivirus software from their computers if they wished to retain access to Tencent's overwhelming popular instant messaging service. Judicial acceptance of such practices would appear to be contrary to well-established abuse of dominance competition law principles, because grounds existed in the case which clearly would categorize Tencent's market leveraging behaviour as being clearly abusive under both the terms of the AML itself (Article 17(4)[109]) and also under EU competition law.[110]

[104] Judicial Interpretation [2012] No 5, art 8: '[…] The defendant shall bear the burden of proof if it offers the defense that the conduct [abuse of dominant position] is justifiable.' EU competition law adopts a similar approach: see Fernandez (n 93); Volpin (n 93).

[105] The EU Court of Justice typically finds market shares in the 40 per cent plus range conferred dominance where the accused enterprise also held other advantages over competitors, such as being highly vertically integrated compared to smaller competitors: eg, Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22.

[106] Judgment no 884 *Feng Yongming v Fujian Expressway Group Co Ltd*, Fujian High People's Court, 2012 [冯永明与福建省高速公路有限责任公司滥用市场支配地位纠纷案]: defendant was held not to have abused its dominant position charging the plaintiff twice the price charged to other consumers who paid expressway tolls with Bank of China cards.

[107] Judgment no 1141 *Gu Fang v China Southern Airlines Co Ltd.* Guangdong High People's Court, 2014 [顾芳与中国南方航空股份有限公司拒绝交易纠纷案]: the defendant refused to provide the flight which the plaintiff had purchased a ticket for, without giving any justifiable explanation.

[108] Judgment no 4 *Qihoo 360 v Tencent*, Supreme People's Court of China, 2013 [奇虎公司与腾讯公司垄断纠纷上诉案] ('*Qihoo 360 v Tencent*, 2013'): the plaintiff alleged Tencent's instant messaging service ('IM') harmed consumer privacy, and released a security tool to combat same, along with its updated antivirus software. Defendant Tencent (80 per cent market share in China's IM market) required consumers to choose either Qihoo's antivirus software or Tencent's own IM platform (used by most people in China). Choosing Tencent would vastly reduce Qihoo's penetration of the online advertising market, where both players were competitors.

[109] AML 2007, art 17(4), now renumbered as AML 2022, art 22(4).

[110] Such as constituting a disproportionate response to a competitor's behaviour by a dominant player (yet the Supreme Court held Tencent's strategy not anticompetitive, instead finding such conduct was a self-protection measure to combat Qihoo's actions). In contrast, such behaviour in the EU would likely be held to constitute abusive leveraging of market dominance, permissible only if there was a convincing objective

D. 'Successful' private enforcement compensation actions: legitimacy and effectiveness concerns illustrated

To conclude this section to demonstrate the dysfunctionality of the court decisions in this area, and SAMR's failure to put forward any proposals to reform the inadequate antitrust compensation regime in China, we now turn to discuss AML private antitrust enforcement actions led by *enterprises* that were successful.[111]

In the case of *Rui Bang v Johnson & Johnson (2012)*, Johnson & Johnson was found to have acted contrary to the AML, by maintaining resale price maintenance arrangements for the sale and supply of medical devices with Rui Bang, subsequently aggravated by the cessation of supplies to Rui Bang when Rui Bang sought to disregard RPM arrangements.[112] Although a favourable finding was made in favour of the plaintiff, nevertheless the scope of the Judgment demonstrates the serious limitations of the level of compensation that comes with a successful private enforcement antitrust action in China.[113] The High Court in Shanghai held that while the applicant was entitled to compensation for loss of profits linked directly to the anticompetitive resale price maintenance arrangements,[114] it could not, as part of an antitrust award, recover other claimed losses (such as losses based on the loss of prospective sales and profits (estimated at 16 per cent of sales)[115]). Such items could only be recoverable, if at all, under *China's Contract Law 1999*, which possesses significant limitations on what is recoverable.[116] This approach to availability of compensation inhibits the awarding of full compensation, and so China's compensation regime as aforedescribed, cannot be said to satisfy the test of Effective compensation. Neither can it be said to satisfy the Legitimacy criterion because the case exhibits a situation where rights, when breached, are not addressed by the granting of an effective compensation remedy.

Another rare instance of a case where a private enforcement case resulted in an award in favour of the plaintiff can be seen in the 2013 case of *Huawei v IDC*.[117]

justification: 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; Case T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289.

[111] *Rui Bang v Johnson & Johnson* (2012); *Huawei v IDC* (2013); *Lou Binglin* (2013). Two further cases (*Healthcare Co Ltd. v TDI* (2018) and *Yangtze River Pharmaceutical Group* (2019)) are not discussed in detail because at the time of writing the full judgment in *Healthcare Co Ltd* (delivered at first instance) was not accessible (though the authors are led to believe that the plaintiff's actual losses were awarded, but not legal costs; and in *Yangtze River Pharmaceutical Group* (Supreme Court appeal) not yet officially available, we understand the lower court awarded the plaintiff actual losses and claimed legal costs.

[112] AML 2022, art 18(1) prohibits price-fixing of the price of commodities for resale to a third party.

[113] 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) 224; Xiaoye Wang and Adrian Emch, 'Chinese Antitrust – A Snapshot' (2015) 3 J Antitrust Enforcement 12, 22.

[114] The profit rate for Rui Bang was 16 per cent.

[115] *Rui Bang* was seeking nearly RMB 144m (approximately USD $20m) compensation; however, it was only awarded a little more than half million RMB (approximately USD $70,000).

[116] The Contract Law of China 1999, art 113 provides that 'the amount of compensation for loss shall be equivalent to the loss actually caused by the breach of contract and shall include the profit obtainable after the performance of the contract […]'. Such recovery under China Contract Law was not possible because in earlier proceedings it had held that *Rui Bang* could not recover such losses on breach of contract grounds: Jifeng Liu and Junlin Wang, *竞争法：规则与案例 [Competition Law: Rules and Cases]* (Law Press 2016) Ch 4.

[117] Case No 858 *Huawei v IDC* (2013) arose before Shenzhen's Intermediate Court in 2011. Huawei sought RMB 20m (approximately USD $2.8m) in damages for abuse of dominance. Unusually for a private antitrust enforcement action, the plaintiff was awarded substantial legal costs, in addition to claimed damages.

Although judgment was awarded in favour of Huawei (as InterDigital was found to have breached IP law by using its IP to oblige Huawei to accept abusive conditions) what is unsatisfactory about the Judgment is that the Court does not use the full compensation approach. Instead it used the standard for assessing damages employed in IP cases, ie, examining the nature of the contested behaviour and the circumstances.[118] Consequently, the court awarded damages in favour of Huawei by considering factors such as the impact of the negative behaviour on the plaintiff; the degree of intentionality about the defendant's abusive actions; and the legal costs of the contested behaviour.[119] Instead of the court assessing the plaintiff's actual loss, loss of profits, etc (as per the EU private antitrust compensation model[120]), compensation was instead awarded on the basis of the degree of culpability of the defendant in abusing its IP rights, and its impact on the plaintiff. In EU competition law this approach is somewhat similar to the approach employed by the EU Commission when called upon to assess fines in antitrust fining cases,[121] rather than what we expect to see as assessment items in a private enforcement action in the courts, where compensation for actual loss, lost profits and interest, should be the main focus (or alternatively triple damages, as per the US model).

Another example of this unorthodox approach to damages assessment can also be seen in the 2013 judgment in *Lou Binglin*.[122] The Court held that an agreement restricting the types and quantities of shellfish that fishmongers could sell was an illegal anticompetitive arrangement contrary to the AML, but yet no damages were awarded and the Court did not explain its reasoning.[123] Other commentators[124] have suggested the Court did not award compensation because there was no loss caused by the defendant's anticompetitive conduct. However, this reasoning is open to scrutiny because it fails to consider (as did the Court) whether the plaintiff could argue that the anticompetitive arrangements deprived him of the opportunity to generate profits from sales lost due to (for example) the plaintiff's inability to sell more shellfish products at lower prices.

It is submitted therefore that this case, and the others considered above, present yet another set of examples of how the courts are, either by virtue of a lack of understanding or deliberate inertia, sidelining the application of the AML either in part or in full, and thereby disabling the Effectiveness of the remedies that a competition litigant would expect to be awarded. Once again, this phenomenon calls into question the Legitimacy of the AML in the eyes of the Judiciary in China.

[118] Xiuting Yuan and Paul Kossof, 'Developments in Chinese Anti-Monopoly Law: Implications of *Huawei v. InterDigital* on Anti-Monopoly Litigation in Mainland China' (2015) 7 Eur IP Rev 438.

[119] Xianlin Wang, 'Recent Developments in China's Anti-Monopoly Regulations on Abuse of Intellectual Property Rights' (2017) 62(4) Antitrust Bull 806, 807.

[120] Antitrust Damages Directive, art 3(2); Sebastian Peyer, 'Compensation and the Damages Directive' (2016) 12(1) Eur Comp J 87.

[121] Juška (n 38) 63.

[122] *Lou Binglin* (2013).

[123] Tao Jun, '北京法院关于审理垄断纠纷案件的调查研究' ['Investigation and Research on the Trial of Monopoly Disputes in Beijing Courts'] (2017) 13(4) Comp Pol'y Res 30.

[124] Chenying Zhang, '损失视角下的垄断行为责任体系研究' ['Understanding the Responsibilities for Monopolistic Conduct with the Perspective of Loss'] (2018) 16 Tsinghua ULJ 193.

III. LACUNAE 2 AND 3: LEGITIMACY CONCERNS ARISING FROM THE LACK OF A RIGHT TO COMPENSATION FOR INDIRECT PURCHASERS AND A PASSING-ON DEFENCE FOR DEFENDANTS

This brings us to the second and third gaps in legal protection which the *AML 2022* does not address: the debate about first, whether, and if so by which means, the law in China confers a right on indirect purchasers[125] to be entitled to seek compensation for antitrust harm to their interests[126]; and secondly, simultaneously the absence in China's law of a passing-on defence for antitrust defendants. Legitimacy considerations arise here because neither of these significant matters is dealt with in SAMR's *2020 reform proposals* nor in the *AML 2022*. Both gaps shall now be addressed in turn.

A. Lacuna 2—legitimacy concerns: the lack of a right of action for indirect purchasers

The failure of *China's Civil Procedure Law* (*CPL 2017*) to confer a right to sue on indirect purchasers poses an insurmountable obstacle for many consumer antitrust victims in China. This is because most consumers will hold the status of being 'indirect' purchasers. Article 119 of the CPL appears to only permit parties who have a 'direct interest'[127] to seek compensation for breach of civil law. This is in marked contrast to the Judicial Interpretation No 5 of 2012,[128] which appeared to recognize that suit could be initiated for losses caused by antitrust conduct, without making any apparent distinction between direct and indirect purchasers.[129] This lack of symmetry between the Supreme Court's Judicial Interpretation of the AML and the CPL's Article 119 raises Legitimacy concerns: what is the point of law conferring rights (the AML),[130] if one group of victims (indirect purchasers) are unable to initiate litigation to contest breach of their AML rights under the CPL (which only recognizes the right of suit to those with a direct interest in a dispute)?

[125] An indirect purchaser is someone who is adversely affected by the illegal activities perpetrated by antitrust actors, but does not have a direct contractual relationship with the violators themselves, for example because they purchase goods/services the subject of antitrust activity from an intermediary not a party to the illegal activity. Unless statutorily provided for, such adversely affected citizens are denied the right of suit to seek compensation.

[126] Opinion among experts is divided on whether indirect purchasers have a right to seek compensation for antitrust violations, those 'for' the proposition (eg, Li Juan, '反垄断实施机制的反思与完善' ['Reflection and Improvement of Anti-Monopoly Law Implementation Mechanism'] (2019) 34 Econ LR 316) point out that the AML itself does not appear to bar indirect purchasers from initiating suit; while those 'against' (eg, Yang Yang, 'Chinese Private Ligation Rules and the *Apple v Pepper* Supreme Court Decision – Standing and Burden of Proof in Private Enforcement' (2019) Competition Policy International) argue that the CPL restricts right of suit only to those who are directly interested, ie, as per the CPL. The authors prefer the 'against' argument: as long as the CPL does not confer a clear right to sue on indirect purchasers, we submit that China's courts will not recognize a right to sue based on the AML alone, which itself remains silent on the matter.

[127] CPL, art 119.

[128] Wording of Judicial Interpretation No 5 of 2012 was slightly revised by the Supreme Court's Amendment Decision Concerning 18 Judicial Interpretations on IP Issues [2020] No 19 but with no impact for the research in this article.

[129] Evrard (n 54).

[130] That is, the right to recover loss and receive compensation for harm caused by antitrust conduct.

These Legitimacy concerns do not raise their head with the corresponding EU and US regimes, which both permit compensation to be awarded where antitrust violations occur, to both direct and indirect purchasers.[131] However in China, private litigants are apparently constrained by the parameters of Article 119 CPL to being a small or perhaps non-existent group. Consumers or small businesses who are antitrust victims will usually be indirect purchasers, rather than direct purchasers, because they shall frequently have purchased from a retail or distribution intermediary[132] who in turn will have purchased the product from the upstream antitrust violator, and so run foul of Article 119 confining the right to sue for breach of civil law only to parties who have 'a direct interest in the case', ie, direct contractual relations with the upstream antitrust violator.

1. Legitimacy hopes fade

While this would appear to run contrary to the 2012 Judicial Interpretation of the AML, it cannot be ignored that there have been *no cases* taken or admitted from indirect purchasers to date in China's courts.[133] Consequently, if the Judicial Interpretation continues to be ignored, then private parties who are indirect purchasers will continue to be precluded (by the regular courts application of the CPL) from seeking compensation for breach of the AML,[134] even though they have suffered loss arising from an upstream antitrust violation. This raises an AML Legitimacy 'red flag'. Notably SAMR's *2020 AML reform proposals* lacked *any* proposals to either recognize or deal with this deficiency in the law, nor does *AML 2022.*

There was a brief moment when commentators thought things might be changing for the better: the 2016 case of *Tian Junwei v Beijing Carrefour Shuangjing Store and Abbott Shanghai* appeared to have allowed an indirect purchaser[135] sue for compensation in antitrust damages proceedings. Although the plaintiff did not eventually succeed on the merits,[136] the judgment was greeted enthusiastically by commentators at the time[137] as heralding a right to sue on the part of indirect purchasers for AML breaches. However, it is submitted that the case stands very much on its own particular facts because the litigant, Mr Tian, was before the court as a 'follow-on' action subsequent to an earlier 2013 decision of China's National Development Reform Commission (NDRC), which had earlier condemned a minimum

[131] The EU more so than the USA admittedly, as shall be discussed shortly below in this section.

[132] Who shall usually constitute the direct purchaser, ie, the distributor or retailer.

[133] Apart from *Tian Junwei's case* in 2016, which we shall discuss shortly in order to show that that was not a 'pure' indirect purchaser case *per se*.

[134] Feng Bo, '反垄断民事诉讼原告资格问题研究' ['Study on Plaintiff Qualification in Antitrust Civil Actions'] (2018) 5 China LR 100 points out that 'the CPL restricts qualified plaintiffs to those who are directly interested, making it difficult for indirect purchasers or end-consumers to qualify as plaintiffs'.

[135] Judgment No 214 *Tian Junwei v Beijing Carrefour Shuangjing Store & Abbott Shanghai*, Beijing High People's Court, 2016 [田军伟与北京家乐福商业有限公司双井店等垄断纠纷上诉案]. The plaintiff Tian was an indirect purchaser because his contract to purchase milk powder was with a supermarket (retailer), Carrefour Shuangjing Store in Beijing, rather than with Abbott, the anticompetitive actor.

[136] The irony is that in the end, Tian eventually was not successful on the merits of the case because the court held that it did not necessarily follow that the contested anticompetitive agreement between Abbott and Carrefour (condemned earlier by the NDRC) was the reason why Tian paid higher prices.

[137] Eg, Li (n 126); Evrard (n 54); Michael Faure and Xinzhu Zhang (eds), *The Chinese Anti-Monopoly Law: New Developments and Empirical Evidence* (Edward Elgar 2013) 381.

price-fixing contract for the supply of milk powder.[138] As the AML is silent on the question of indirect purchasers having a right to sue, the question arises whether this judgment recognized such a right implicitly?

It is submitted that the case cannot be said to be authority for the proposition that indirect purchasers can sue for compensation based on the AML alone for the following reason: Mr Tian was allowed to sue for compensation because this was a follow-on private action following on from an earlier regulatory decision finding anti-competitive infringements on the part of the defendant. It was because of the follow-on element that the plaintiff was entitled to bring legal action seeking compensation without needing to invoke Article 119 CPL.[139] That is quite a different proposition than presenting the case as being authority for the notion that indirect purchasers have the right to sue purely based on the AML alone: the court's decision in *Tian* does not therefore have any further application beyond the party's dispute. The AML 2022 is silent on remedying this lacuna: thus the very Legitimacy of the statutory regime must be called into question when the law on one hand (the AML) confers rights (to challenge anticompetitive action), while simultaneously on the other hand another law (the CPL) only confers the right to sue for infringement to a privileged group (ie, direct purchasers), while denying the right of action to a far larger group (ie, indirect purchasers). It is the CPL that is the barrier to indirect purchasers taking legal action, rather than technical items such as the burden of proof, which has no bearing in a follow-on action because in such actions the plaintiff relies on the proof of infringement adduced by the investigating regulator in the earlier investigation to assist his or her case. Whether the court in the subsequent compensation-seeking action accepts such proof or not is a matter for the court.

2. Legitimacy: China approach on indirect purchasers contrasted with EU/USA approaches

The contrast between the approach taken to indirect purchasers in China (described immediately above) and the EU and US regimes is interesting: both of the latter regimes permit compensation for antitrust violations to be awarded to both direct and indirect purchasers, to one extent or another. The EU's position is the most straightforward: the EU's Antitrust Damages Directive (2014) not only explicitly recognizes antitrust litigation rights for indirect purchasers,[140] but it also allows defendants to invoke the 'passing-on' defence[141] as well (this latter element shall be considered later below). In the USA, the position is somewhat more complicated,[142]

[138] 国家发展和改革委员会行政处罚决定书, 发改办价监处罚 (2013) 4 号 [NDRC's Decision on Administrative Punishment, No 4 of 2013].

[139] The CPL was not pleaded in the case.

[140] Antitrust Damages Directive, art 12(1) explicitly recognizes indirect purchasers right to seek compensation for antitrust violation (the reason why the EU recognizes indirect purchasers is because Court of Justice case law predating the Directive's adoption made it explicit that when an individual's EU rights are violated, they must have access to the courts and their rights must be vindicated in full: see C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465; C-295/04 *Manfredi* ECLI:EU:C:2006:461).

[141] Antitrust Damages Directive, art 12(2); see Guidelines for National Courts on How to Estimate the Share of Overcharge Which Was Passed onto the Indirect Purchaser [2019] OJ C267/4.

[142] Albert A Foer and Randy Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (Edward Elgar 2021) 80–88.

yet remains significantly more positive for litigants than is the case for litigants in China. While it is true to say that the US Supreme Court initially adopted a strict position *vis-a-vis* indirect purchasers, adopting a position somewhat similar to the restrictive CPL position in the so-called '*Illinois Brick* rule' Judgment[143] (1977), nevertheless the Court did recognize a number of exceptions to the bar on recovery for indirect purchasers in *Kansas v Utilicorp United* (1990).[144] For example, the Supreme Court recognized that indirect purchasers should have the right to seek compensation under the *Clayton Act*[145] where: (i) the direct purchaser was controlled by the antitrust violator; or, (ii) where the direct purchaser was part of the antitrust conspiracy with the primary antitrust violator; or (iii) where the direct purchaser has been party to a 'costs-plus' supply arrangement, whereby it was inevitable that the antitrust price (determined upstream) would be passed onto inevitably to the indirect purchaser.[146] So the US position, while not conferring an automatic right of action for indirect purchasers (like the EU does), does recognize a right to recovery for indirect purchasers in several defined situations which makes it quite different from the position in China.

Additionally, the US position is further distinguished from China because many of the individual US States have passed laws at State level conferring compensation rights on indirect purchasers where they allege violation of State level antitrust laws as a means to get around the *Illinois Brick* prohibition (which constrains indirect purchasers' freedom to take compensation-seeking action at Federal level in the USA, as discussed immediately above[147]). In *California v ARC America Corp*,[148] the US Supreme Court found that such State level laws were not *ultra vires* as long as they did not directly seek to obviate the law at Federal level. Consequently, many of the major US States (eg, California,[149] New York,[150] Illinois[151]) have enacted laws that confer standing on indirect purchasers, thereby allowing them take legal action for violation of State-level antitrust laws; while only a minority of States (eg, Florida[152]) have enacted laws that prohibit such action at State level, with a clear majority of US

[143] *Illinois Brick Co v Illinois* (1977) 431 US 720, para 97, based on the reasoning that it could be excessively difficult to apportion damage between direct and indirect purchasers, and also that more direct purchasers might emerge, so the US Supreme Court held that indirect purchasers could not sue for antitrust infringements: see further William M Landes and Richard A Posner, 'Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' (1979) 46 U Chi LR 602; Robert G Harris and Lawrence A Sullivan, 'Passing on the Monopoly Overcharge: A Response to Landes and Posner' (1980) 128 U Pa LR 1280.

[144] *Kansas v Utilicorp United* (1990) 497 US 199, paras 110 and 218.

[145] The Clayton Act 1914, s 15(a).

[146] Herbert Hovenkamp, '*Apple v Pepper*: Rationalizing Antitrust's Indirect Purchaser Rule' (2020) 120 Colum LR Forum 14; Robert M Langer, 'The Role of State Attorneys General in the Private Enforcement of State Antitrust and Consumer Protection Statutes' (1988) 18 J Reprints for Antitrust L Econ 85, 87.

[147] Kevin O'Connor, 'Is the Illinois Brick Wall Crumbling?' (2001) 15 Antitrust 34, 35; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its* (3rd edn, West Publishing 2005) 617–27.

[148] *California v ARC America Corp.*(1989) 490 US 93.

[149] California Business and Professions Code (2017), s 16750(a).

[150] NY General Business Law (2012), s 340.

[151] Illinois Antitrust Act 10/7(2) (740 Illinois Compiled Statutes (ILCS) 10/7) (2010).

[152] Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (2019), s 501.204; *Mack v Bristol-Myers Squibb Co* (Fla Dist Ct App 1996) 673 So. 2d 100, 102.

states taking the California approach.[153] China, however, continues to not adopt either of the litigant-friendly EU and US approaches: it adopts what the authors refer to an 'Illinois Brick-minus' position, namely a prohibition on indirect purchasers having right of suit, with no exceptions permitted. This raises a major Legitimacy 'red flag': ie, by maintaining the position that unless consumers purchase directly from the antitrust violator, they have no right under China's CPL to initiate private antitrust enforcement action to seek compensation for antitrust violations that adversely affect their welfare.[154] *AML 2022* remains silent on the matter, and so question marks over the Legitimacy of China's enforcement system for indirect purchasers are amplified particularly, because among the AML's objectives is listed the protection of consumer welfare.[155]

B. Lacuna 3—legitimacy concerns: lack of a passing-on defence for defendants—China approach contrasted with EU/USA approaches

As a corollary to the lack of a right to sue on the part of indirect purchasers is the lack of a passing-on defence to avoid overcompensation arising in antitrust enforcement actions.[156] This gap in antitrust protection in China's legal system raises major Legitimacy concerns. *AML 2022* does not give any consideration to the introduction of a passing-on defence into the private antitrust enforcement regime. In the EU competition law context, the passing-on defence[157] aims to avoid overcompensation in antitrust damages recovery litigation, in order to avoid the prospect of overcompensation occurring (as both direct and indirect purchasers could claim for full compensation for the infringement of competition law).[158] In the USA, while there is no passing-on defence available at Federal level,[159] the defence is available in

[153] The Antitrust Modernization Commission, 'Report and Recommendations' (2 April 2007) vi points out that 36 US states and the District of Columbia granted private antitrust litigation rights to indirect purchasers, and suggested that (at 267) that Federal law should allow '[…] consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings […]'. However, this suggestion was not taken forward by the Federal legislature. See Eric McCarthy, Gregory S Seador and Charles R Price (eds), *Indirect Purchaser Lawsuits: A State-by-State Survey* (American Bar Association 2010).

[154] Action for breach of China contract law would not be appropriate to propose as an antidote either, because normally there will be no privity of contract between the indirect purchaser and the antitrust violator.

[155] *Inter alia*, AML art 1 refers to the need to protect consumer welfare.

[156] Shuwei Qi, 'Research on the Rule of Passing-On Defence and Indirect Purchaser in China's Anti-Monopoly Law' (2014) 26 Econ LR 35.

[157] Antitrust Damages Directive, arts 13 and 14: an antitrust suit defendant may invoke the passing-on defence if they can prove that the claimant has passed on the overcharge to customers and has not suffered any loss. The EU Commission published Guidelines for National Courts on How to Estimate the Share of Overcharge Which Was Passed onto the Indirect Purchaser [2019] OJ C267/4. The UK's first art 13 passing-on case was *Sainsbury's Supermarkets v MasterCard* [2018] EWCA 1536 (Civ), paras 320–42 and 352–53, where passing-on could not be established to the tribunal's satisfaction, as the defendant had failed to produce evidence of same.

[158] Once the EU recognized a right of suit for indirect purchasers, then a passing-on defence had to be provided as well in order to avoid overcompensation being awarded against defendants who may already have been fined by the public enforcement authorities: see Stephan (n 85). Interestingly, in contrast, in the USA it is argued that overcompensation is not a concern in the USA because the primary cause of antitrust compensation is deterrence: see eg, Lande and Davis (n 24).

[159] In *Illinois Brick* (1977) 431 US 720, 745 the Supreme Court observed that the reason for not having a passing-on defence at Federal level in antitrust actions was because it would inject extremely complex issues into antitrust cases and reduce the benefits to plaintiffs by dividing the potential recovery among a much larger group, thereby reducing the incentive of plaintiffs to use this important weapon of antitrust enforcement.

some,[160] though not all, of those US States where indirect purchaser right to sue-enabling statutes have been enacted.[161] However, some US States among that group do allow for compensation to be obtained by indirect purchasers, and therefore make a passing-on defence available in order to prevent overcompensation or double recovery.[162]

The introduction of a passing-on defence in China could serve as a control mechanism, to ensure that direct purchasers were not overcompensated in private antitrust enforcement actions.[163] Accompanying its introduction should be the enactment of antiabuse provisions, so that the introduction of the passing-on defence not be permitted to become a tactical tool for enabling private enforcement litigation to be used by either direct or indirect purchasers as a malicious tool to either maximize their own interests, disturb the market, or frustrate the legitimate business strategies of other enterprises.[164] In recent years, abuse of civil actions by plaintiffs has been on the increase in China and has attracted critical judicial attention for wasting use of judicial resources, as well as damaging the efficacy and credibility of the judiciary.[165] Abuse of the antitrust enforcement process can be viewed as a Legitimacy 'red flag', as can absence of legal measures to minimize abuse of litigation occurrence.[166]

Therefore, in order to obviate this Legitimacy concern, and at the same time avoid this possibility arising should China decide to introduce a right to sue for indirect purchasers into the CPL, the passing-on defence should be enacted into the AML and the CPL contemporaneously with the introduction of a right of suit for indirect purchasers. Accordingly, direct purchasers would not be able to seek compensation from the defendant after they had transferred the damage (eg, higher cartel pricing) to indirect purchasers.[167] So for example, in the 2016 case of *Tian Junwei*, were the law to be changed such that it was clear that Tian as an indirect purchaser should have the right to sue Abbott, then in such circumstances the direct purchaser (ie, a retailer from whom indirect purchasers like Tian would have obtained the

[160] Roger van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar 2017) Ch 8.

[161] This is because while those States (about 36 currently) allow an indirect purchaser to take legal action, they may confine remedies to merely injunctive relief, in which event no passing-on defence is required.

[162] Eg, the California Supreme Court in *Clayworth v Pfizer Inc* (2010) 49 Cal. 4th 758 held that although there was no general passing-on defence in the *Cartwright Act* (the State's antitrust law), it could be available in exceptional cases, such as where there is a 'costs-plus' situation, or where it is necessary to prevent double recovery (ie, overcompensation).

[163] Robert H Lande and Joshua P Davis, 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 U San Francisco LR 879, 887.

[164] Xiao Wang and Wensong ren, '民事诉权滥用的法律规制' ['The Statutory Regulation on the Right of Action Abuse'] (2015) 5 Modern L Sci China 183.

[165] Gang Zou, '民事诉权滥用的危害' ['The Harmful Effects of Abuse of Civil Actions'] *Legal Daily* (Beijing, 4 May 2016) 9; the Central Committee of the Communist Party of China, '中国中央关于全面推进依法治国若干重大问题的决定' ['Decision on Major Issues Pertaining to Comprehensively Promoting the Rule of Law'] *China Daily* (Beijing, 29 October 2014) 1.

[166] Lande and Davis observe that abuse of process poses a Legitimacy concern in the context of private antitrust enforcement, as is the absence of antiabuse rules to reduce the prospect of abuse of antitrust litigation: Joshua P Davis and Robert H Lande, 'Defying Conventional Wisdom: The Case for Private Antitrust Enforcement' (2013) 48 Georgia LR 1, 78.

[167] This would align with the EU's approach in this subject: Guideline for National Courts on How to Estimate the Share of Overcharge Which Was Passed onto the Indirect Purchaser [2019] OJ C267/4, 8-9.

product[168]) would be held under the passing-on defence not to have suffered any loss, and thereby should not have the right to claim damages from Abbott, and thus prospect of the anticompetitive actor (Abbott) having to pay overcompensation would be avoided; while simultaneously, Tian (the indirect purchaser/consumer) would be entitled to sue flowing from the anticompetitive breach and recover compensation for loss.

IV. LACUNA 4: LEGITIMACY AND EFFECTIVENESS CONCERNS SURROUNDING COLLECTIVE ACTION

The fourth lacuna identified raises issues in the context of collective action.[169] The legal basis for collective action in China is based on the provisions of the *CPL 2017*. Effectiveness in the context of collective action[170] requires that injured parties suffering losses from anticompetitive conduct shall have available to them some form of either individual or collective action (whether joint or representative actions, or opt-in or opt-out forms of collective action) to protect their legal rights. In this section, we shall see that, to date, *no* AML enforcement cases based on either Articles 52 ('joint litigation'[171]) nor 53 CPL ('joint representative actions'[172]) have been observed, and even more concerning, there have been *no* 'opt-in' actions taken[173] pursuant to Article 54 CPL.[174]

Furthermore, when it comes to the question of Legitimacy in the context of collective action,[175] Article 55 CPL[176]—which underpins public interest actions—appeared

[168] Though note that on the particular facts of *Tian's* case, the court held that Carrefour the retailer (the direct purchaser) who had supplied Tian with Abbott's product, could not be held party to a price-fixing arrangement because Tian was unable to prove that Carrefour was a party to the anticompetitive arrangement, that is why *Tian's* case ultimately failed (and being an indirect purchaser he had no right to sue under the CPL).

[169] CPL, arts 52–55. On the international background to collective actions generally, see eg: Csongor István Nagy, *Collective Actions in Europe A Comparative, Economic and Transsystemic Analysis* (Springer 2019) 71–112; Spencer Weber Waller and Olivia Popal, 'The Fall and Rise of the Antitrust Class Action' (2016) 39 World Comp. 29.

[170] Juška (n 38); Crane (n 38).

[171] CPL, art 52(1): meaning similar cases joined into one action by the court for judicial efficiency. While the authors cannot rule out the possibility that there could be such actions taking place at the lowest levels of local courts (Primary Courts) because we did not have access to any such records in our research, the authors' research has not observed any such cases in the higher (High Courts and the Supreme Court) or Intermediate level courts (Intermediate Courts and IP Courts).

[172] CPL, art 53: meaning numerous individual litigants numbering more than 10 individuals, agree to group their actions under the banner of a lead representative litigant.

[173] China shares some of the same weaknesses as the UK opt-in regime, eg, a very short-time limit in which to opt-in (see further below). US private antitrust collective litigation reflects an 'opt-out' model, rather than an 'opt-in' one: David Scott and others, 'Global Trends in Private Damages: The Future of Collective Actions' (2017) 13 Comp L Intl 137.

[174] CPL, art 54 'opt-in' action consists of an action by numerous persons, whose number is undetermined, who elect to opt-in to the action within a specified time period set by the court by way of public notice, whereby the Court states the particulars of the case and requests that the claimants register with the Court within a certain period.

[175] Lande and Davis posit that Legitimacy of private antitrust enforcement could be understood from the perspective of legal rules including those pertaining to class action and whether they are strictly implemented by the courts, or not: see Lande and Davis (n 24).

[176] CPL, art 55 provides that: 'Legally designated institutions and relevant organisations may initiate proceedings at the Court against acts jeopardising public interest […]'

unavailable for antitrust enforcement action because prior to enactment of Article 60(2) *AML 2022*, there was a lack of legal certainty[177] as to whether public interest actions can be invoked at all in private antitrust enforcement actions. Although Article 60(2) *AML 2022* introduces a public interest antitrust action for the first time, thereby part-resolving[178] the Legitimacy concern formerly surrounding the public interest action and whether it can be taken against anticompetitive practices,[179] an assessment of the Effectiveness of Article 60(2) of the *AML 2022* will only become evident as time goes by.

Demonstrating the weakness of collective action provisions in China in this section will, by extension, raise questions about why the *AML 2022* failed to make any reform in this important area. The problems are readily identifiable. First, the Article 52 and 53 CPL actions ('joint' and 'representative' collective actions, respectively) are procedurally cumbersome.[180] Secondly, the Article 54 CPL 'opt-in' action also presents another drawback, namely potentially very short time limits for opting-in.[181] Thirdly, the Article 55 public interest action did not appear to be available in the antitrust context under the Civil Procedure Law prior to 2022.[182] Further aggravating this situation is the fact that the designated public interest litigant under Article 55 for the purposes of threats to consumers,[183] the China Consumers Association (CCA) is not perceived to be a sufficiently independent consumer rights advocate,[184] and is not regarded as sufficiently active on the antitrust front, thereby raising further Legitimacy concerns. The limitations of the four forms of collective action listed above will now be considered, demonstrating how each raises either AML Effectiveness or Legitimacy concerns from a private antitrust enforcement perspective. Each shall now be considered in turn.

A. Effectiveness and Legitimacy: the CPL Article 52 joint action and Article 53 representative action

The first and second forms of collective action we consider are the Article 52 CPL 'joint action' and the Article 53 'representative action'. The Section 52 joint action is the only form of collective action that to date has been clearly confirmed by the Supreme Court as being available for private antitrust enforcement actions in its 2012 Judicial Interpretation on matters arising in private antitrust enforcement litigation.[185] Joint action is where the court may order the joining of individual actions

[177] Judicial Interpretation of the Supreme Court and the Supreme Procuratorate No 6 on Several Issues Concerning the Application of Law in Prosecuting Public Interest Litigation [2018], art 13.

[178] 'Part-resolving' because the body designated to initiate the new art 60 public interest action is the State Procuratorate, part of the machinery of State, rather than independent of it.

[179] AML 2022, art 60(2).

[180] See below discussion on CPL, arts 52 and 53.

[181] See below discussion on CPL, art 54.

[182] See below discussion on CPL, art 55.

[183] The CCA is designated as the art 55 public interest action representative for consumers pursuant to art 47 of *the Law on the Protection of Consumer Rights and Interests 2013*.

[184] The 'CCA is not really the ideal public interest representative due to its partial funding by the government, plus individual consumers will still have to initiate their own personal legal action in order to claim a compensation award that would flow from a successful CCA public interest action: *see* further below in 'Lacuna 4.C' 'Effectiveness and Legitimacy: the CPL Article 55 and AML 2022 Article 60(2) public interest action'.

[185] Judicial Interpretation [2012] No 5, art 6.

(where less than 10 individual actions[186]) into a single joint action, if the court considers it appropriate to do so.[187] Chinese consumers have no autonomy to maintain individual actions in the event that the court prefers that they be gathered into a joint action; nor do they have the autonomy to join together in a joint action unless with the court's blessing. The court is the arbiter of whether actions should proceed in joint form, or not. This could affect the Effectiveness of these actions because the court is in the driving seat, not the individual litigants.

The Article 53 representative action[188] comes into play where there are more than 10 individual actions with the same interest in their claims. It is applicable where, for more than 10 individual actions,[189] two to five representatives who are the litigants themselves can be elected to front the representative action.[190] This Article 53 CPL representative action differs from the Article 52 CPL joint action in that the Article 53 action is more similar to US and EU[191] national court procedures, which invariably provide that it is for individual plaintiffs themselves to apply to join another's action by consensus, rather than by direction of the courts. However, the Article 53 CPL representative action has never been used in any private antitrust enforcement actions in China, because to date, the Supreme Court has never taken the opportunity to give clear guidance to confirm that it can be used for the purpose of taking collective enforcement in antitrust litigation.

Another limitation of the Article 53 representative action, which it shares with the Article 52 joint action regime, is that acts of one party will bind the others only if they have the same interest in the claim.[192] This reduces the usability of both the joint action and the representative action: where litigants have different interests, then the acts of one party cannot bind the other.[193] Thus for example, procedural acts taken by one party will bind the other parties, but only if they have been prior-recognized by the other parties; and if there are no common rights and obligations, then procedural acts cannot bind other joint parties to the action without their consent. This counters the very idea of having joint action, such as empowering injured parties and reducing the costs of litigation,[194] and can also make the pursuit of the legal action difficult to contemplate. This is further exacerbated in the antitrust context, where antitrust claims can be complex, and so the courts in China continue to prefer to hear antitrust claims as individual actions, thereby defeating the usability of the joint and representative action mechanisms, even if desired by the individual

[186] Judicial Interpretation of the Supreme Court Concerning the Civil Procedure Law of China [2015] No 5 ('Judicial Interpretation [2015] No 5'), art 75.

[187] CPL, art 52(1).

[188] CPL, art 53.

[189] Judicial Interpretation [2015] No 5, art 75: a 'large number of people' as per CPL arts 53 and 54 means 10 or more people in general.

[190] ibid, arts 76 and 78.

[191] OECD, 'Working Party No. 3 on Co-operation and Enforcement: Relationship between Public and Private Antitrust Enforcement' (9 June 2015) DAF/COMP/WP3/WD(2015)11.

[192] CPL, art 52(2).

[193] A similar situation also occurred under the UK's *Competition Act 1998* / opt-in collective redress mechanism, see eg, *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284 where litigants were willing to represent both direct purchasers and indirect purchasers.

[194] Maria Teresa Vanikiotis, 'Private Antitrust Enforcement and Tentative Steps towards Collective Redress in Europe and the United Kingdom' (2014) 27 Fordham Intl LJ 1639, 1658.

plaintiffs. This raises a major Legitimacy concern, neither addressed in SAMR's *2020 reform proposals* nor in *AML 2022*.

B. Effectiveness and Legitimacy: the CPL Article 54 collective action—comparison with the EU 'opt-in' action

The third form of collective action is the Article 54 CPL collective action,[195] which we might term as somewhat analogous to (for example) the UK 'opt-in' action,[196] whereby representatives can be appointed to represent all consumers who join in the collective proceedings and have the same interest in their claims.[197] The judgment that results will bind all opt-in claimants, ie, those who opt-in by the deadline (set by the Court) and those who have filed individual claims.[198]

However, during the past 14 years since the *AML 2007* came into force, this Article 54 form of collective 'opt-in' action has not been used[199] as a vehicle for taking private antitrust actions in China, because several factors adversely affect its availability, and hence its Legitimacy. This is firstly because, there is no clear indication in the AML itself that collective opt-in action is permitted, because the AML does not explicitly mention antitrust actions as falling within the contemplation of the CPL collective opt-in action procedure. The AML itself does not (apart from permitting joint actions and public interest action) explicitly provide for a right of collective action, according to the 2012 Judicial Interpretation of the AML.[200] Therefore to signal that this opt-in remedy is available, a revision of the AML should be undertaken to make it clear that breach can be litigated by way of the Article 54 CPL-based opt-in action. This is necessary because historically, consumers or small enterprises in China do not have a tradition of undertaking mass litigation.[201] China of course would not be unique in this regard: even in the EU not all Member States[202] have embraced the opportunity to allow for collective action with relish.[203]

There are also other obstacles to using the opt-in collective action in China: for example, once an opt-in action is initiated in China, the court is obliged to invite consumers at large to register their interest in the action with the court,[204] but the

[195] CPL, art 54.

[196] UK Competition Act 1998, s 47B(10).

[197] Judicial Interpretation [2015] No 5, arts 77 and 78.

[198] CPL, art 54(4).

[199] Feng Bo and Yang Tong, '我国反垄断集体诉讼制度的构建与实施' [The Construction and Implementation of Antitrust Collective Action] (2018) 6 Acad J Zhongzhou 58.

[200] Judicial Interpretation [2012] No 5, art 6.

[201] Peter CH Chan, *Mediation in Contemporary Chinese Civil Justice* (Brill 2017) Ch 2.

[202] In 2018 the European Parliament reported that four EU Member States (Belgium, Denmark, Bulgaria, and UK (still a member at the time)) offered both opt-in and opt-out regimes; fourteen Member States offered the opt-in regime only (Austria, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Romania, Spain, and Sweden); 2 Member States offered the opt-out regime only (Netherlands and Portugal); and a small number of remaining States (eg, Luxembourg) had not indicated whether they were going to offer either opt-in or opt-out regimes: European Parliament, 'Collective Redress in the Member States in European Union' (October 2018) PE 608.829, 140, and 197.

[203] In the EU generally, neither the enforcement community nor consumers have enthusiastically embraced collective action: David Ashton, *Competition Damages Actions in the EU: Law and Practice* (2nd edn, Edward Elgar 2018) Ch 11.

[204] Judicial Interpretation [2015] No 5, art 79.

problem with this mechanism is that the CPL only obliges the court to set a minimum of 30 days within which consumers may register their interest, thereby leaving it open to the court to set a short maximum opt-in time limit, at or beyond, the 30-day minimum time limit.[205] As a consequence many consumers will never become aware on time of the opportunity to register their interest in the opt-in action.[206]

Concerns surrounding exposure to unpredictable litigation costs constitutes another obstacle to participation in opt-in action in China. China would not be unique in this respect; consumers may not wish to incur litigation filing costs in circumstances where they cannot be sure what their individual responsibility for the legal costs will be, even if the action taken is successful, because each side normally bears their own legal costs and the courts traditionally have not been generous in the awarding of legal costs to the victor.[207]

In conclusion, concerns about the Legitimacy of the Article 54 action remain and *AML 2022* does nothing to assuage these concerns. It remains silent on this key issue.

C. Effectiveness and Legitimacy: the CPL Article 55 and AML 2022 Article 60(2) public interest action

The fourth form of collective action to be considered is the 'public interest action' (Article 55 CPL) which can be used to vindicate antitrust infringements adversely affecting consumers' rights.[208] It is akin to a form of 'opt-out' action. At first glance, this form of action would appear to offer better prospects than the previous forms of joint or collective action considered above, because, for example, it is specifically focused on protecting the 'public interest' and specifically refers to 'consumers rights'. However, upon closer inspection, several key limitations to its potential application in a private antitrust enforcement context become obvious. Each limitation shall now be considered in turn, namely:

1. the Legitimacy concern (albeit somewhat assuaged by the recent enactment of *AML 2022*, Article 60(2)); and
2. an Effectiveness concern, first because the Article 55 CPL designated public interest representatives, such as the China Consumer Association is not in a

[205] Unlike the US collective action regime, where a minimum of 30 days' notice period is required, a longer period suggested is a period somewhere in the more generous 60–90 days range: see Federal Judicial Center, 'Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide' (2010) 4.

[206] The UK (for example) suffers from a similar problem: early opt-in cut-off dates result in low participation rates in opt-in collective actions. Participants in collective actions in the UK are thereby restricted in number, with many failing to opt-in on time: Rachael Mulheron, *Class Actions and Government* (CUP 2020) 47. Of some 100 or thereabouts opt-in cases taken in the UK in the past 20 years, participation rates are low: just as in China, few British consumers participate in opt-in actions, eg, less than 600 consumers joined the 'Which?' (the UK consumer association) collective redress action against *JJB Sports*' price-fixing cartel (out of between 1 and 2 million affected consumers in total: see *The Consumers' Association v JJB Sports plc* (CAT Case 1078/7/9/07); Camilla Sanger, Peter Wickham and James Lawrence, 'England and Wales' in Camilla Sanger, ed, *The Class Actions Law Review* (4th edn 2020).

[207] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019) Ch 6.

[208] Liping Jiang, 'Research on the Possibility of Civil Public Interests Protected by Individual Litigation in China: Based on the Path of Similarity of Interests' (2019) 15 Canadian Soc Sci 10, 13.

position to challenge the antitrust behaviour of major State-backed SOEs[209]; and second because the action provides at best a 'cease and desist' remedy, rather than providing a direct compensation award—individual litigation is still required in order to obtain compensation.[210]

1. Legitimacy adversely affected by narrow legislative reach

The first limitation is one of legislative scope: a major weakness for those seeking to invoke this form of action to pursue antitrust infringers is that regrettably, the *CPL 2017* makes no explicit reference to its use in antitrust actions, instead referring to breaches of public interest matters such as environmental matters and consumer matters. Consumer matters are stated to include 'food and drug safety or any other conduct that damages social interest'.[211] Even though safeguarding consumer interests and achieving public interests are vital objectives of the AML itself,[212] and the interests of consumers adversely affected by anticompetitive behaviour could be said to relate to the public interest,[213] the Article 55 public interest action in China was not intended to be available to those wishing to vindicate their AML rights. This is because the CPL contains no specific reference to antitrust enforcement being within the remit of its Article 55 public interest litigation mechanism, and further because it is submitted that the public interest being protected by Article 55 is consumers interests in the 'traditional sense' of the term, rather than in the antitrust context.[214]

However, interestingly, notwithstanding this difference in context and the lack of a specific reference to private antitrust enforcement in the CPL, nevertheless there is the prospect that this somewhat convoluted distinction as to the meaning of 'public interest' could be deviated from in the future, following the handing down of Supreme Court 'Judicial Interpretation No 10 of 2016 on Consumer-Related Public Interest Actions', which *inter alia* recognized that it remained a matter for judicial discretion to decide what behaviours should be considered as damaging to the public interests of consumers.[215]

Some clarity now comes to the area in the sense that Article 60(2) of the *AML 2022* addresses this Legitimacy question by recognizing, for the first time, a dedicated public interest action that can be taken to challenge anticompetitive practices. Plaintiffs taking litigation action, following such public interest litigation, will be able

[209] Bin Sheng and Xiaosong Wang, 'China's Trade Policy: Evolution and Determinants' in Ka Zeng (ed), *Handbook on the International Political Economy of China* (Edward Elgar 2019) 54 observes that the CCA is a 'semi-official' agency, implying that the CCA would not be seen to be sufficiently independent of government, and so will not be expected to aggressively counter (for example) SOE's antitrust market practices, whose progress has been prioritized for decades by supportive Government industrial policies.

[210] Yougen Li, 'Study on Consumers Association Right to Claim for Damages in Public Interest Litigation—A Discussion on the Judicial Interpretation of the Supreme Court' (2017) 35 Pol Sci L 1.

[211] CPL, art 55(2).

[212] AML, art 1: 'This Law is […] safeguarding the interests of consumers and public interest […]'

[213] Chen (n 57).

[214] Art 2 of Judicial Interpretation [2016] No 10 on Consumer-Related Civil Public Interest Actions named four categories of consumer interest that can be the subject of art 55 CPL collective action (eg, protecting consumers from being supplied with defective or dangerous goods) and antitrust enforcement was not named among that list.

[215] This has now taken place, albeit by legislative action, with the enactment of AML 2022, art 60(2) which provides that public interest actions can be taken (by the Procuratorate) to protect consumers antitrust rights.

to rely on findings made in the earlier public interest action taken by investigating authorities in follow-on lawsuits when seeking compensation. This will reduce the onus normally associated with satisfying the burden of proof for such plaintiffs.

However, a potential limitation on the potency of Article 60(2) lies in the fact that this new Article 60(2) public interest action can only be activated by the People's Procuratorate or any organization certified by it: such bodies alone will make the decision on whether to initiate the public interest action, ordinary citizens cannot.[216] Only time will tell whether this possible Legitimacy conundrum will occur or not.

2. Effectiveness negated by status of designated collective litigant representative

Article 55 CPL raises two Effectiveness concerns. The first concern is that the *Law on the Protection of Consumer Rights and Interests 2013* designates the CCA as the designated collective litigant representative for Article 55 purposes.[217] The problem with this designation is that the CCA is, despite the name, a body under government control.[218] Accordingly, its incentive to challenge allegedly anticompetitive behaviour by, say SOEs,[219] is naturally questionable. This is a reasonable criticism, because the CCA and its local branches[220] are substantially funded by the government. Although SOE's comprise no more than 3 per cent of the total number of enterprises in the Chinese market,[221] they make a very substantial contribution to China's annual tax revenues, typically contributing no less than a third of the total tax contribution to regional governments in recent years for example.[222] Therefore, given their significance to both the regional and national economies, it would be contrary to regional (and national) governments' own interests for the government-funded CCA to be activist in mounting antitrust challenges to coffers-boosting SOEs. Hence, the CCA is perceived as a paper tiger. Notwithstanding that in 2016 the range of bodies who can act as collective litigant representatives of consumers in the public interest action was broadened to allow for the designation of 'social organisations authorised by law or the National People's Congress and its Standing Committee',[223] consumers (injured parties) or indeed any other independent organizations remain ineligible to act as Article 55 CPL public interest representatives.[224] In this respect, the approach of

[216] CPL, art 55(1).

[217] The Law on the Protection of Consumer Rights and Interests 2013, art 47.

[218] Dan Wei, 'Enforcement and Effectiveness of Consumer Law in the People's Republic of China' in Hans W Micklitz and Genevieve Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 195.

[219] Ju Liu and Shi-Ting Liang, '4 年 14 案, 消费公益诉讼之路未来怎么走' ['14 Cases in 4 Years, What is the future of Consumer Public Interest Litigation in China'] *Times News* (Beijing, 13 July 2019) observing that CCA should be more active in challenging SOEs' antitrust conduct.

[220] Stephen Brobeck and Robert N Mayer (eds), *Watchdogs and Whistleblowers: A Reference Guide to Consumer Activism: A Reference Guide to Consumer Activism* (Greenwood 2015) 90.

[221] National Bureau of Statistics of China (NBS), *China Statistical Yearbook* (NBS 2010–2019).

[222] Chang Cai and Beilei Li, '我国不同所有制企业实际税负比较研究' ['A Comparative Study on the Actual Tax Burden for Enterprises with Different Types of Ownership in China'] (2017) 36(11) South China J Econ 57.

[223] Judicial Interpretation [2016] No 10, art 1. Another limitation of the 2016 Judicial Interpretation (which grants the right to the National People's Congress and its Standing Committee to authorise representatives) is a lack of transparency vis selection criteria or guidance on qualities selected representatives should satisfy.

[224] Guowei Zhang, '补强消费民事公益诉讼"短板"' [Reinforcing the "Shortcomings" of Consumer Public Interest Litigation] *People's Court Daily* (Beijing, 30 April 2019) 6.

China's consumer law is very different from the US[225] approach, for example, which allows class members (eg, consumers) also eligible to serve as class representatives.[226]

3. Effectiveness frustrated by inadequate remedy—contrast with EU/US approaches

The second Effectiveness concern raised by the Article 55 CPL public interest action is that it is designed to primarily provide a 'cease and desist' remedy, rather than a direct compensation remedy. The Beijing No 4 Intermediate Court's judicial mediation decision in *CCA v Lovol International Heavy Industry Co. Ltd*[227] illustrates this remedy limitation. Admittedly, Lovol is not an antitrust case (supply of defective goods), yet it nevertheless illustrates how the Article 55 CPL public interest action provides merely a 'cease and desist' remedy. Consumers attempting to use Article 55 in an antitrust enforcement action context, would, just as in *Lovol*, have to initiate separate follow-on litigation to recover compensation. In *Lovol*, the CCA challenged Lovol's selling of poor-quality three-wheeled motorcycles to consumers. The court confirmed the CCA's finding that Lovol's supplied sub-standard products harmful to consumers[228] (contrary to *the Law on the Protection of Consumer Rights and Interests 2013*[229]). However, there was no automatic award of compensation to affected consumers (as would be the case in, say, a UK opt-out action[230]). Adversely affected consumers would still have to personally sue *Lovol* for follow-on compensation individually by using the CCA's finding to support their compensation-seeking litigation, rather than merely be assessed for compensation following the court ruling,[231] thereby raising an Effectiveness red flag for Article 55 CPL public interest action.[232]

This Effectiveness concern about Article 55 CPL is further illustrated as follows: although the Article 55 public interest action is a little similar to the UK[233] opt-out

[225] US collective action, which relies on an opt-out model, has been successful. For example, 'the median reach calculation on approved notice plans was 87%' according to the Federal Judicial Center's 2010 'Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide'. See also Edmund W Searby, 'United States: Private Antitrust Litigation – Class Actions' (2015) Global Comp Rev 45.

[226] Eg, the Federal Rules of Civil Procedure (2020), r 23; the UK's Consumer Rights Act 2015, s 81 (which replaces s 47B of the Competition Act of 1998).

[227] Judicial Mediation Decision No 94 *China Consumer Association v Lovol International Heavy Industry Co. Ltd*, Beijing No 4 Intermediate Court, 2019 [北京市第四中级人民法院 2019 第 94 号民事调解书].

[228] Liu Jia, '中消协首例公益诉讼调解结案，六项诉讼请求全部实现' ['The China Consumers Association First Public Interest Concluded; All Six Claims Were Upheld'] *Sichuan Observer* (China, 23 July 2019) <https://cbgc.scol.com.cn/news/160074> accessed 3 December 2022.

[229] Art 55 of the 2013 ACT provides a right to compensation where consumers are fraudulently provided with defective goods and services.

[230] Under the UK model, once the court makes an adverse finding against the defendant on the competition issue, then obtaining compensation is a matter of assessment only: see generally James Devenney and Mel Kenny, 'Study to Support the Fitness Check of EU Consumer Law – Country Report United Kingdom' in *Study for the Fitness Check of EU Consumer and Marketing Law: Final Report 3 – Country Reporting* (EU Commission 2017) 1210, 1254.

[231] Albeit benefitting from not having to bear the burden of proving the breach on account of the CCA's earlier infringement findings against defendant *Lovol*.

[232] Dai Xuan, 'The CCA's First Public Interest Litigation Reached an Order' *Beijing News* (Beijing, 23 July 2019) A14 (so consumers can, based on the order, subsequently sue for punitive compensation).

[233] Note that we are not discussing the EU for comparison purposes in this Lacuna because the overwhelming majority of Member States (18 presently) offer opt-in, hence we refer to the UK as a model for comparison purposes, rather than EU in this section of the article.

model,[234] and to the US-style class action regime,[235] however, the US action does not suffer the same Effectiveness deficit as Article 55 because the US consumer does not have to initiate a subsequent full personal lawsuit legal action in order to claim compensation,[236] unlike their China counterpart.[237] While China's Article 55 opt-out public interest mechanism did seek to overcome a defect in China's 'opt-in' model[238] (the Article 54 CPL collective action) discussed above[239]; however, it takes a different approach with regard to accessibility to compensation. The opt-out model in the US regime is supportive of seeking damages: in other words, all eligible/injured claimants could be granted compensation without taking out extra lawsuits.[240] However, compensation for China's consumers is difficult to obtain under Article 55 CPL, because the CCA's public interest action, if successful, still requires injured consumers to subsequently initiate legal action individually seeking a compensation award. So, while this is a regrettable feature of the China public interest litigation system, at least it does confirm that follow-on action to obtain compensation is possible.[241] Notwithstanding this 'bright spot', our overall conclusion is that the utility of the CPL Article 55 action for consumers in the private antitrust remedies context remains remote. Although the Legitimacy concern has been somewhat solved by *the AML 2022* section 60(2) explicitly permitting public interest action for the first time

[234] In that if a consumer has not opted-out, then they are deemed to have opted-in. Though they are different in that consumers in China, unlike in the UK, cannot rely on the finding of infringement to receive compensation unless they conduct subsequent litigation. See the UK's Consumer Rights Act 2015, s 81 (which replaces s 47B of the Competition Act of 1998).

[235] Similar, in that if a consumer has not opted out, then they are deemed to have opted in; but different in that the representative in the US action can be chosen from amongst the litigants, unlike in China where the representative litigant is designated by the State. Also, the US action is seeking a compensation award, unlike the art 55 action in China which does not provide a direct route to a compensation award, its primary remedy instead being 'cease and desist'. On the UK and US models, *see* further Arianna Andreangeli, *Private Enforcement of Antitrust: Regulating Corporate Behaviour through Collective Claims in the EU and US* (Edward Elgar 2014) 194.

[236] Even though sometimes injured claimants in the USA might need to take 'follow-up proceedings' to prove their losses caused by antitrust conduct: Richard Marcus, 'Revolution v. Evolution in Class Action Reform' (2018) 96 N Carolina LR 903, 934.

[237] See discussion on *Lovol* above.

[238] As discussed above, deficiencies include excessively short time periods for opting-in, plus uncertainty about responsibility for legal costs, plus a conservative litigation culture: such factors discourage consumers from opting-in, such that to date, there has been not a single opt-in case taken in this area in China.

[239] Because art 55 CPL allows the collective representative to litigate on behalf of all eligible claimants (eg, consumers) unless they opt-out, whereas art 54 only assists those who either opt-in or who have already commenced personal litigation.

[240] A separate issue of course is whether the compensation in such cases in the USA is adequate: concerns are frequently expressed sufficiency: Brian T Fitzpatrick and Robert C Gilbert, 'An Empirical Look at Compensation in Consumer Class Actions' (2015) 7 NYU JLB 771, 771–2.

[241] Triple damages of a punitive nature may be recovered by the consumer for infringement of China's consumer law (as per art 55 of *the Law on the Protection of Consumer Rights and Interests 2013*) though this does not of course extend to antitrust infringement actions, as they fall outside of the 2013 Act. In this respect, the China consumer damages regime is stronger than the comparable UK consumer law regime, eg, in the UK damages in opt-out cases are generally awarded on a purely compensatory basis, rather than on a punitive basis: see 'Competition Law Redress: A Guide to Taking Action for Breaches of Competition Law' (CMA, 2016) para 5.4. The USA offers the possibility for punitive damages, consequently defendants are seeking pre-trial settlement to minimise this prospect: Linda S Mullenix, 'Ending Class Actions as We Know Them: Rethinking the American Class Action' (2014) 64 Emory LJ 339, 420–1.

vis AML breaches, Effectiveness concerns remain unaddressed for the foreseeable future.

V. CONCLUSIONS

An examination of the four major lacunae discussed in this article illustrates how the current private antitrust enforcement regime in China exhibits major antitrust enforcement Effectiveness deficiencies in remedies, as well as major Legitimacy concerns arising from China's deficient private antitrust enforcement mechanisms. The *AML 2022* has rarely done anything in substance to specifically address these four lacunae, apart from a plea that the AML be respected by all. Our main conclusions therefore are as follows:

A. Findings

First, unlike the EU and US antitrust enforcement systems, China's AML enforcement system raises an immediate Effectiveness red flag when it fails to provide for anything near to full compensation for private antitrust enforcement litigants: court decisions in cases where private litigants have been successful are very few in number in China, with compensation awarded usually being meagre and very limited in scope.[242] This is markedly in contrast to the compensation available to private antitrust litigants in either the EU or USA.

Secondly, indirect purchasers are unable to take private antitrust enforcement action in China at all: this raises serious Legitimacy concerns.[243] The antitrust enforcement system in China as presently constituted cannot escape this Legitimacy concern. The fact that indirect purchasers cannot take enforcement action means that potentially millions of consumers and businesses in China are being denied the right to sue when harmed by antitrust infringements, notwithstanding that AML Article 1 proclaims the AML to be an antitrust measure that seeks to promote consumer welfare.[244] Comparison with the EU position is stark, and while a little less so with the US position, yet in no sense can the China and US positions on indirect purchasers be said to be broadly similar.

Thirdly, even if indirect purchasers were to be accorded a right to take private antitrust enforcement action in China, China's corresponding lack of an antitrust passing-on defence in either China's AML or CPL means that direct purchasers could potentially be overcompensated. It is proposed that China should consider adopting the passing-on defence mechanism similar to that deployed in EU antitrust law, to avoid overcompensation occurring.[245]

Fourthly, collective actions raise both Effectiveness and Legitimacy concerns.[246] Several forms of collective action are provided for under China's Civil Procedure Law, but none have been deployed by consumers in antitrust actions. Consumers

[242] See above Lacuna 1, where the problems associated with limited compensation were considered.

[243] See above Lacuna 2, where the question whether indirect purchasers have a right of action was considered.

[244] AML, art 1.

[245] See above Lacuna 3 where the problems associated with the lack of a passing-on defence were considered.

[246] See above Lacuna 4 where the problems associated with collective actions were considered.

either fear unlimited exposure to legal costs potentially out of all proportion to the value of their individual claims, or they are unable to take the opportunity to opt-in to collective actions due to short opt-in deadlines set by the courts. In the enforcement context of the public interest action, Effectiveness concerns remain because the designated public interest action representative (eg, the China Consumers Association) is not seen as a sufficiently independent consumer public interest advocate.

All of the foregoing demonstrates that private antitrust enforcement litigation mechanisms in China remain ineffective for injured parties' protection, and the *AML 2022* does not seek to address these four lacunae either in substance, or in name. The Legitimacy and Effectiveness of private antitrust enforcement mechanisms and norms therefore remain under serious question in China.

B. Proposals for reform to ameliorate effectiveness and legitimacy concerns

In order to change such a negative private antitrust enforcement environment for consumer litigants and private enterprise litigants in China, the following improvements to the AML are suggested for future reforms. These suggestions are motivated principally by the need to enable China's Civil Procedure Law private litigation mechanisms to be suitable for deployment in AML private antitrust enforcement action. Furthermore, adoption of such improvements can also serve to fulfil the original ambition China had when it adopted the *AML 2007*, namely to modernize its domestic laws in order to fulfil obligations associated with WTO conditions of entry.[247]

Therefore, bearing in mind that the AML on its face exhibits many of the hallmarks of (in particular, EU competition law norms and ideals[248]), and also bearing in mind that globalization of trade should bring benefits not just for multinationals but also for private citizens, the following suggestions are proposed by the authors to ease the Effectiveness and Legitimacy concerns raised about the AML in this article:

1. Compensation—AML Effectiveness and Legitimacy in the Compensation context would be strengthened by amending the AML to make it clear that 'full',[249] rather than limited, compensation should be available to private antitrust enforcement litigants under the AML[250]; the 2012 Judicial Interpretation of the AML on this matter should be restated[251] and the Judiciary instructed on proper interpretation of the AML dominance test;
2. Indirect Purchasers—AML Legitimacy would be enhanced by awarding indirect purchasers the same clear right to initiate private antitrust

[247] Greg Mastel, 'China and the World Trade Organization: Moving Forward without Sliding Backward' (2000) 31 L Poly Intl Bus 981.

[248] Federico (n 2).

[249] To cover actual losses, loss of profits, interest, and legal costs.

[250] Achievable by amending AML 2007, art 50, to emphasize that antitrust infringers will bear comprehensive liability to fully compensate for antitrust harm caused to others, Lacuna 1 above.

[251] Judicial Interpretation [2012] No 5, art 14, discussed in Lacuna 1 above.

enforcement compensation actions as direct purchasers currently hold, removing the current non-suiting of millions of consumers and businesses (as indirect purchasers)[252];

3. Passing-On Defence—AML Legitimacy could be created (in this context) for the first time by introducing such new protection for defendants, to compliment the introduction of the right of suit for indirect purchaser plaintiffs, as proposed immediately above[253];
4. Opt-Out and Opt-In Actions—AML Legitimacy and Effectiveness, which has been recently strengthened by *AML 2022*'s adoption of the Article 60 (2) AML public interest antitrust action, would be further strengthened by providing that compensation should be available as a primary remedy under the *AML 2022* Article 60(2) public interest opt-out action[254]; and additionally, the AML/CPL should both be amended to make it clear that the AML can be enforced by way of the CPL's 'opt-in' collective action[255];
5. Public Interest Actions—AML Effectiveness in this context can be improved by allowing for the designation of independent public interest action representatives in public interest actions,[256] and by amending the *Law on the Protection of Consumer Rights and Interests 2013* to make it clear that protecting consumers from antitrust infringements falls within the remit of consumer protection.[257]

Without reform in the above areas, China's corporations will continue to enjoy protection from private antitrust enforcement in their vast home market, thus conferring on them a significant comparative 'home' operating advantage when competing against their foreign competitors operating out of antitrust-regulated foreign markets outside China.[258] Apart from private antitrust enforcement protection concerns in China, which were the focus of this article, this conferral of comparative advantage raises a global trading issue, namely that China is conferring a significant competitive advantage on its own large private corporations and SOEs,[259] many of whom now operate globally in both China and in foreign marketplaces, by protecting them from

[252] Achievable by amending art 119(1) CPL (as well as the AML itself to ensure legal certainty): see discussion on providing a right of action for indirect purchasers, Lacuna 2 above.

[253] Achievable by amending the Judicial Interpretation [2012] No 5, possibly art 1 or art 14, to provide for a passing-on defence: see discussion on the lack of a passing-on defence, Lacuna 3 above.

[254] Achievable by suitably amending art 47 of *the Law on the Protection of Consumer Rights and Interests 2013* as proposed, see Lacuna 4 above.

[255] Achievable by amending the AML and art 6 of the Judicial Interpretation [2012] No 5, discussed in Lacuna 4 above, as well as by providing for longer opt-in deadlines under CPL, art 54.

[256] CPL, art 55 and *the Law on the Protection of Consumer Rights and Interests 2013*, art 47 should be accordingly revised, as per discussed in Lacuna 4 above.

[257] As amending art 47 of *the Law on the Protection of Consumer Rights and Interests 2013* in this regard, Judicial Interpretation [2016] No 10, art 2 would require revision: see Lacuna 4 above.

[258] Alessandro Baroncelli and Mattro Landoni, 'Chinese State-Owned Enterprises in the Market for Corporate Control: Evidences and Rationalities of Acquisition in Western Countries' in Alessandra Vecchi (ed), *Chinese Acquisitions in Developed Countries: Operational Challenges and Opportunities* (Springer 2017); Loren Brandt and Eric Thun, 'Competition and Upgrading in Chinese Industry' in Barry Naughton and Kellee S Tsai (eds), *State Capitalism, Institutional Adaptation, and the Chinese Miracle* (CUP 2015).

[259] Eg, Huawei (a non-SOE); Bank of China (an SOE).

potent private antitrust enforcement exposure inside their massive domestic home market, which drives their global economic engines.[260] This confers upon China-domiciled global players a significant commercial advantage[261] not enjoyed by many of their foreign-domiciled competitors who no longer enjoy such antitrust 'immunity' back in their 'home' markets in major blocs such as the EU or the USA, where both public and private enforcement action against antitrust violation has undergone significant reform in recent years.[262]

China's failure to address the four lacunae examined in this article reveals perhaps a fundamental truth, namely that maintaining the continuation of the four lacunae in private antitrust protection considered in this article confirms that the State's view of the citizen's relationship with the State continues to place the citizen in a subservient position to corporate interests in the market.[263] This conclusion is reached because the four clear and obvious lacunae this article examines as opportunities for China to address private antitrust enforcement mechanisms concerns, were not discussed in SAMR's *2020 AML reform proposals*, and continue not to receive legislative attention in the *AML 2022*.

Therefore, while the primary focus of this article has been on the four key deficiencies that raise major Effectiveness and Legitimacy questions about the AML private enforcement regime, in the background is the wider concern that in all of these four key areas corporations engaging in breaches of China's AML are placed in a significantly advantageous position compared to their EU or US counterparts operating outside of China, on account of these four lacunae in private antitrust enforcement mechanisms and laws remaining unaddressed inside China.

In conclusion, the absence of any significant AML reform pertaining to any of the four major lacunae represents a major weakness in the *AML 2022*: China's adoption of EU-inspired antitrust concepts via the AML regime remains deficient while these four AML lacunae remain. This raises several serious Effectiveness and Legitimacy concerns about private antitrust enforcement in China, which continue to remain unaddressed. Private antitrust enforcement—having only ineffective, or sometimes, no remedies, available—will continue to be an area of weak antitrust protection for adversely affected consumers and indeed private enterprises in China, one of the world's largest consumer markets, and so the Legitimacy and Effectiveness of the antitrust law itself, the *AML 2022*, remains in question.

[260] See generally Xiaomin Fang, 'The Application of the Chinese AML to State-Owned Enterprises' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar 2018).

[261] Angela HY Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 Cornell Intl LJ 671, 674.

[262] Eg, in the EU since the adoption of the Antitrust Damages Directive, arts 3, 12, and 14.

[263] Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 J Intl Econ L 657.