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I. INTRODUCTION

Celebrating its 20th anniversary, the Law on the Protection of Consumer Rights and Interests—which was promulgated in 1993 and took effect in 1994—was newly revised in 2013.[2] The revisions will take effect from March 15, 2014. (For easier reading, we will refer to the original and revised versions of the law as "1993 Consumer Protection Law" and "New Consumer Protection Law," respectively).[3] Compared to the 1993 Consumer Protection Law, the New Consumer Protection Law reflects the huge change in China's consumption patterns. The revisions aim at meeting the requirements of new trends in consumer protection.

In this revision, a large number of rules were amended or added. Substantial provisions involving the protection of personal information, the right to return goods bought online, and remedies against unfair contractual clauses have won extensive public praise. Procedural provisions related to mechanisms such as "public interest litigation," the reversal of the burden of proof, and punitive damages have also grabbed headlines, but are more controversial. To a great extent, these mechanisms differ from the existing general framework for civil litigation.

Similar to the United States, in China companies have begun using the Anti-Monopoly Law ("AML")[4] to resolve commercial disputes. This trend has accelerated since the entry into force of the Provisions on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct ("Judicial Interpretation") by the Supreme People's Court on June 1, 2011.[5] However, there are no procedural stimulations such as class actions and triple damages as in the United States, and private enforcement of antitrust law in China has not been very active so far.

This article will place particular emphasis on the procedural provisions newly revised for consumer protection, since they not only have a great impact on civil litigation in relation to consumer protection, but also on private antitrust enforcement.

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[2] *Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests,* adopted at the 5th Session of the Standing Committee of the 12th National People's Congress of the People's Republic of China on October 25, 2013.

[3] Law of the People's Republic of China on the Protection of Consumer Rights and Interests, [2013] Presidential Order No. 7, October, 25, 2013.

[4] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, August 30, 2007.

[5] Provisions by the Supreme People's Court on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, [2012] Judicial Interpretation No. 5.

II. LEGAL FRAMEWORK FOR PUBLIC INTEREST LITIGATION

In China, only those who are directly related to a dispute are entitled to bring a civil action to the court and become the subject of litigation. The existing legal framework does not have a mechanism similar to class actions in the United States, and China's private litigation has remained relatively underdeveloped for a long time. This situation began to change in 2012, when the Civil Litigation Law was revised ("New Civil Litigation Law").[6] The amended law took effect on January 1, 2013. Article 55 of New Civil Litigation Law features a breakthrough relative to the prior framework, which required plaintiffs to be "directly related to" the dispute to have standing:

> Relevant bodies and organizations prescribed by law may bring a suit to the people's court against such conduct as environmental pollution, harm of the consumer's legitimate interests and rights and other conduct that undermines the social and public interest.[7]

It is generally believed that this provision establishes the "public interest litigation" mechanism in China. However, it is equally clear that the implementation of this provision in the New Civil Litigation Law needs other laws or rules to specify which the "relevant bodies and organizations prescribed by law" are. Actually, the New Consumer Protection Law is one of these corresponding laws. In Article 47, it provides that

> the China Consumers Association and the consumer associations established in all provinces, autonomous regions and municipalities may bring lawsuits to the people's courts against activities detrimental to the legitimate rights and interests of a large number of consumers.

According to our reading of the above two provisions, "public interest litigation" under the New Consumer Protection Law refers to the following situation: If a large number of consumers are or may be harmed, and the specific number of the consumers is uncertain, then a consumers association unrelated to the dispute has the right to bring a suit before court in its own name, in order to protect the public interest.

Public interest litigation has two characteristics: first, the consumers association is entitled to act as a plaintiff in its own name; second, consumers that were directly harmed by the wrongful conduct are allowed to join the suit brought by the consumer association for free. Therefore, the condition in the prior civil litigation rules—that only those directly related to the case had standing as a plaintiff—has changed.

Until now, no law or regulation explicitly provides that anticompetitive conduct falls within the scope of "other conduct that undermines the social and public interest" under Article 55 of the New Civil Litigation Law. However, many observers believe that anticompetitive conduct is, in many aspects, similar to conduct such as environmental pollution, and harms consumers' rights and interests. Anticompetitive conduct can have a significantly negative impact upon social and public interests, and the victims often do not obtain effective redress or

[6] *The Decision of the Standing Committee of the National People's Congress on Revising the Civil Litigation Law of the People's Republic of China*, adopted at the 28th Session of the Standing Committee of the 11th National People's Congress on August 31, 2012

[7] Civil Litigation Law of the People's Republic of China, [2012], Presidential Order No. 59, August 31, 2013.

sufficient compensation (winning, if anything, relatively low-value damages amounts). Victims are usually unwilling to bring an individual lawsuit to request compensation for damages. In some circumstances, where a large number of individual lawsuits are brought for the same infringement, procedural efficiency can be impeded if these lawsuits cannot be joined.

Thus, representative actions by consumers associations under the New Consumer Protection Law represent a landmark event, including a possibility for private antitrust litigation. It is possible that the first "public interest litigation" suits by a consumers association targeting anticompetitive conduct will be brought in the near future after the New Consumer Protection Law takes effect on March 15, 2014.

III. ENCOURAGING PRIVATE ANTITRUST ACTIONS THROUGH "PUBLIC INTEREST LITIGATION"

The AML only has one provision referring to civil litigation, and this provision (Article 50) is at a very high level.[8] The Supreme People's Court had tried to include a provision to encourage private actions in the Judicial Interpretation. A draft provision of the Judicial Interpretation was similar to that in the New Consumer Protection Law. That is, the draft provision would have empowered a consumers association to bring an action on behalf of a group of consumers.

However, the draft provision was not enacted, likely because the Supreme People's Court thought that such a ground-breaking change of the prevalent civil litigation framework could not be done through a comparatively low level legislative text such as a Judicial Interpretation. There is no doubt, however, that the National People's Congress has enough authority to make such a change through the revision of two laws—the Civil Litigation Law in 2012 and the Consumer Protection Law in 2013.

A. Encouraging Class Actions

Private antitrust enforcement in China is far behind that of developed jurisdictions. The lack of modern class actions is one of the main reasons. In the United States, around 20 percent of the private antitrust suits are class actions, which is one of the most important reasons why the United States is perceived to have a leading position in the area of private antitrust enforcement.

As for the European Union, it does not have a long tradition of private enforcement in the antitrust area. However, the European Commission is striving to change the situation. Its White Paper on damages actions for antitrust violations published in April 2008 explains that the underlying issue the European Commission seeks to address is that individual consumers are often deterred from bringing an individual action for damages as a result of the costs, delays, uncertainties, risks, and burdens involved. The outcome is that victims often fail to obtain adequate compensation in the case of antitrust violations.

Hence, in its White Paper, the European Commission proposes a combination of two complementary mechanisms for collective redress: (1) representative actions, which are brought by qualified entities such as consumers associations, state bodies, or trade associations on behalf

[8] Article 50 of the AML stipulates, "if business operators implement monopolistic conduct and cause loss to others, the business operators shall be responsible for civil liabilities in accordance with the law."

of victims; and (2) opt-in collective actions, in which victims expressly decide to combine their individual claims into one single action.[9]

Compared with the U.S. and EU practices, private enforcement of antitrust law in China is still in its infant stage. It should be noted that, in most of the cases brought by individuals, the plaintiff is just one of a large number of consumers. Generally, the plaintiffs claim a relatively small amount of damages. For instance, in *Li Fangping v. China Netcom*, Li Fangping, the plaintiff, brought the action in his own name against the defendant, a fixed-line telephone service provider in Beijing. The plaintiff argued that China Netcom had abused its dominant market position. In particular, Mr. Li alleged that the defendant conducted discriminatory treatment to his detriment. The alleged discrimination was between him, as a China Netcom customer without a registered residence (*hukou*) in Beijing, and those customers with registered residences in Beijing. Only the latter were able to sign a post-paid contract with China Netcom according to the company's policy. It is noteworthy that Mr. Li asked for just RMB 1 in damages.

In *Li Fangping v. China Netcom*, the plaintiff's claims were dismissed by the Beijing Intermediate People's Court at first instance and the Beijing High People's Court on appeal.[10] It is not hard to imagine that the courts would be overburdened, and judicial resources wasted, if all consumers without a registered residence in Beijing brought actions against the same defendant.

Indeed, there are some similar cases where the victims may be numerous. In August 2008, for example, Liu Fangrong brought an action against the Chongqing Insurance Association for insurance loss of RMB 1, alleging that the defendant had implemented a cartel.[11] Similarly, in April 2009, in *Zhou Ze v. China Mobile*, the plaintiff asked the court to issue an injunction to stop the defendant from abusing its market dominance by collecting monthly rental fees. The compensation the plaintiff claimed in that case was the refund of RMB600-worth of paid monthly rental fees.[12]

None of the above-mentioned cases was finally adjudicated in favor of the plaintiffs. Part of the reason is the conduct challenged may actually be in line with the antitrust laws. But it is also possible that the individual consumers lost the lawsuits because they were simply not able to discharge the burden of proof. Moreover, it is possible that the courts took into consideration that, should the plaintiffs win the case, a large number of actions might be brought by victims who were in conditions similar to the plaintiffs. In any event, the series of judgments against the consumer-plaintiffs definitely discouraged victims of antitrust violations from coming forward.

It seems that class actions are one of the best ways to address the issues facing private antitrust litigation in China. Article 54 of the New Civil Litigation Law allows "representative

[9] European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008)165, final, sec.2.1.

[10] Beijing Intermediate People's Court No. 2, *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch*, December 18, 2009, [2008] Er Zhong Min Chu Zi No. 17385; and Beijing High People's Court, *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch*, June 9, 2010, [2010] Gao Min Zhong Zi No. 481.

[11] *See* Sina Finance,*Chongqing Insurance Association is Accused of Monopoly*, August 17, 2008, *available at* http://finance.sina.com.cn/china/dfjj/20080817/13325207533.shtml (last visited on January 20, 2014).

[12] *See* Money 163, *China Mobile's Monthly Rent Collection is Suspected of Monopoly*, October 28, 2009, *available at* http://money.163.com/09/1028/00/5MM23EJF002526O3.html(last visited on January 20, 2014).

actions" where a large yet uncertain number of persons have standing at the commencement of the action. The representative action is a type of class action that, however, is subject to the traditional restriction: the representative must be directly related to the dispute. So, although the representative action is able to solve the procedural inefficiency caused by the multiplicity of actions brought by a large number of individual consumers for the same antitrust infringement, the requirement that the representative be directly involved in the dispute reduces the effectiveness of the new procedural tool. In particular, as pointed out in the European Commission's White Paper on damages actions for breaches of antitrust rules, individual consumers may be deterred from filing an action for damages because of the costs, delays, uncertainties, risks and burdens involved.

Further, in practice, courts have taken an extremely cautious attitude towards representative actions involving an uncertain number of persons. We are not aware of any successful representative action yet, even outside the antitrust field.

Unlike representative actions involving an uncertain number of litigations, which are a kind of class action brought by consumers, "public interest litigation" is a kind of class action brought by consumers associations. A key difference is that these associations are generally not directly related to the specific dispute. Since the litigation is initiated by consumers associations, individual consumers might be compensated for their loss—which might be relatively small and not worth an individual action—without excessive costs and risks.

Thus, if a consumers association can bring an action as a plaintiff in its own name, individual consumers are more likely to get involved in a private antitrust litigation and are able to focus on more substantial issues such as evidence collection. In addition, more individual consumers may get involved in "public interest litigation "as such cases are more likely to be adjudicated in favor of the plaintiffs. If so, this may create a virtuous circle that promotes the development of class actions in the antitrust field.

B. Connecting Private and Public Antitrust Enforcement

China's public enforcement of antitrust rules has achieved significant progress since the AML's entry into force. Both the National Development and Reform Commission ("NDRC")—the authority responsible for investigating and sanctioning price-related anticompetitive conduct—and the State Administration for Industry and Commerce ("SAIC")—the authority in charge of handling enforcement against anticompetitive conduct not related to pricing—accelerated their public enforcement during 2013. In particular, for actions against price-related conduct, NDRC investigated and punished industries such as LCD panels, high-end liquors, infant formulas, gold, and jewelry, imposing fines reaching the billions of RMB. As for actions against non-price related conduct, SAIC investigated about 30 cases and 13 of them have been announced publicly and formal decisions have been adopted.

These antitrust cases—especially those investigated by NDRC—usually have a strong impact on consumers and thus attract a great deal of attention from the public. The *Moutai* and *Wuliangye* cases are good illustrations. As a provider of one of the most famous high-end liquors loved by millions of consumers in China, Moutai was exposed in early January of 2013 as having warned its distributors against their practice of lowering resale prices below the level fixed by Moutai. With an aim to maintain its high-level retail prices, Moutai threatened to penalize those

distributors who violated its resale price maintenance ("RPM") policy. As a result, Moutai suspended its contracts with some distributors, and parts of the distributors' deposits were withheld. Similar to Moutai, Wuliangye—another high-end white liquor producer—was reported to have punished its distributors for violating its RPM policy.

Since RPM is mentioned as an illegal vertical agreement in the AML, the two companies' conduct triggered investigations by NDRC. On February 22, 2013, NDRC authorized its provincial branches in Guizhou to impose a fine of RMB 247 million on Moutai. On the same day, Wuliangye was imposed a fine of RMB 202 million by NDRC's Sichuan branch. Both the official media and the public at large expressed their support for NDRC's action in the *Moutai* and *Wuliangye* cases. The media and public were particularly supportive as the two companies are state-owned enterprises, and few law enforcement authorities in China "dare" punish state-owned enterprises.

However, although Moutai and Wuliangye have been sanctioned by NDRC in public decisions, no individual consumer has tried to bring a "follow-on" action—based on NDRC's public decision—to seek compensation for damages suffered. There are a large number of consumers who had suffered as a result of the anticompetitive conduct of Moutai and Wuliangye, by paying the overcharged retail price for their liquor.

From this case it can be seen that China lacks mechanisms that function as bridge to connect public with private antitrust enforcement. The same issue can be found in NDRC's decisions in the *LCD panels* case (RPM), *Baby milk formula* case (RPM), and *Gold and jewelry* case (cartel), all made public during 2013.

"Public interest litigation" brought by consumers associations under the New Consumer Protection Law have the potential to function as a bridge between public and private enforcement. Let us still take the *Moutai* case as an example. After Moutai was punished by NDRC, the New Consumer Protection Law would allow those consumers who believed they were harmed to request a consumers association—say, the China Consumers Association—to bring an antitrust suit against Moutai. Of course, the China Consumers Association could also launch an action against Moutai on its own initiative. Since the China Consumers Association can, in its own name, represent all consumers having suffered from the RPM conduct of Moutai, consumers who could show to have suffered harm could expressly decide to combine their individual claims into the "public interest litigation."

Since the victims who suffered from Moutai's anticompetitive behavior are numerous, and their loss is relatively small, joining their claims through "public interest litigation" is the best way to establish a platform to win the suit against the perpetrator, in this case Moutai. For example, even though Moutai's anticompetitive practice has been identified, it is still hard for an individual consumer to prove the specific amount of loss.

There is another situation where public and private enforcement could be connected—i.e., after a consumers association wins a "public interest litigation" case against a company infringing antitrust rules, an antitrust authority could follow up with an administrative investigation. An example of this scenario is the *Huawei v. InterDigital* case. In mid-2013, the Guangdong High People's Court rendered its judgment in that case. Shortly after, NDRC was

reported to be investigating InterDigital for alleged abuse of dominance for the way it had exercised some of its standard-essential patents.

In short, "public interest litigation" could work as a bridge to connect public and private antitrust enforcement since it is one of the best tools to bring together harmed consumers and allow them to join forces to overcome cost and risk challenges.

IV. OTHER PROCEDURAL ISSUES

"Public interest litigation" aside, the New Consumer Protection Law has brought some other revisions that are believed will influence private antitrust enforcement in China.

A. Reversal of the Burden of Proof

According to the applicable legal framework in general civil litigation, the primary principle for the burden of proof is "he who is affirming must prove." The allocation of the burden of proof plays a key role in practice. Even if a plaintiff's claims are legitimate on the substance, the action will only be successful if the pertinent evidence is collected. If the burden of proof is too high or too costly, then the justice system does not work properly.

Compared to the 1993 Consumer Protection Law, the New Consumer Protection Law strengthens the obligation of businesses. Among all the measures taken in the new law, the reversal of the burden of proof in relation to certain issues is one of the sharpest weapons for consumers. This measure addresses the problem of the high burden of proof and high cost for a consumer to claim his or her rights.

In contrast with the 1993 Consumer Protection Law, a new paragraph was added to Article 23 of the New Consumer Protection Law. Article 23(3) now reads:

> where disputes arise because consumers find defects in the motor vehicles, computers, television sets, refrigerators, air conditioners, washing machines and other durables, or decoration or furnishing services provided by business operators within six months upon accepting such products or services, the business operators shall bear the burden of proof regarding the defects.

This newly added paragraph reverses the burden of proof regarding defects in products or services such as durables or decoration services. It will have a significant impact on the trial of disputes in respect of consumer rights, and will increase the probability that cases are adjudicated in favor of consumers. As is well known, proving the existence of product defects often involves specialized knowledge and is often a difficult and costly task. However, according to the New Consumer Protection Law, it is the business operators—rather than the consumers—that now bear the burden of proof pertaining to whether the product has defects. If the business operators cannot submit sufficient evidence to prove that the product has no defects, they will have failed to discharge their burden of proof and must bear the adverse consequences. The courts then would find the products involved as defective, and further find that the business operators should bear civil liability towards consumers.

The reversal of the burden of proof, as provided in Article 23 of the New Consumer Protection Law, might also have an impact on private enforcement of antitrust law in China. Since there are no laws or regulations that explicitly explain the concept of "durables," it is quite likely that companies held to violate antitrust rules also produce or sell durables. For example, on

January 4, 2013, NDRC imposed a fine of RMB 353 million on six LCD panel producers from Korea and Taiwan for price-fixing. During 2001-2006, the six LCD panel producers had convened 53 times in so-called "crystal meetings" to exchange competitively sensitive information on LCD panels and to fix prices. Since LCD panels might also be regarded as durables, Article 23(3) of the New Consumer Protection Law might be applicable and found to infringe antitrust rules.

B. Punitive Damages

According to the traditional theory on compensation for damages, the best principle is that of full compensation, which means that the scope of damages should only be based on the actual property losses caused by the illegal act.

However, in China, under certain circumstances, some laws and regulations allow for punitive damages. As such, Article 55 of the New Consumer Protection Law involves punitive damages in the case of fraudulent activity and product liability. It reads:

> Unless otherwise prescribed by law, business operators that practice fraud in providing products or services shall, on the demand of consumers, increase the compensation for their losses by an amount that is three times the payment made by the consumers for the products purchased or services received, or in the amount of RMB 500 if the increased compensation is less than RMB 500.
>
> Where business operators knowingly provide defective products or services for consumers, causing the death of, or serious health damage to, the consumers or other victims, the victims shall be entitled to demand the business operators to compensate for the losses in accordance with Article 49 and Article 51 of this law and other legal provisions, and to demand punitive damages of up to twice the losses suffered.

Accordingly, whether or not a consumer can claim triple damages in a private antitrust action depends on how the courts would interpret the concept of "fraud." The Supreme People's Court is expected to promulgate a judicial interpretation to give guidance on the implementation of the New Consumer Protection Law. Hopefully, an interpretation of the definition of "fraud" will be included in the judicial interpretation. This guidance may explain if, and how, the courts will be empowered to award punitive damages in private antitrust actions.

V. CONCLUSION

The New Consumer Protection Law, which will come into effect on March 15, 2014, is expected to have significant impact on private antitrust enforcement in China.

The "public interest litigation" provision in the amended law is likely to encourage consumers and /or consumer associations to bring more court actions based on allegations of monopolistic behavior. This legislative change may possibly lead to quasi-class actions in China, which will make private enforcement a comparatively powerful weapon against anticompetitive conduct. In addition, some procedural provisions in the New Consumer Protection Law—such as the reversal of the burden of proof and punitive damages—will likely also shape the future of private antitrust litigation in China.