
**FACULTY OF LAW**
**Lund University**

**Hanrui Cai**

# EU Competition Law Enforcement Regime - What Can China Learn?

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**Supervisor: Carl Michael von Quitzow**

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# Summary

Competition law is the law enacted to regulate competitive conduct in a free market. In a free market, the market is considered to have an efficient self-regulating mechanism and requires no further intervention from governments. However, a free market does not mean that all sectors of the economy can be left to free competition, and a free market economy cannot ensure that the market can operate perfectly. As a result, competition rules are adopted to deal with market failures and imperfections, to protect consumers' interests and to promote fair market competition.

The first modern competition law was introduced in Canada in 1889. Since then, more jurisdictions have adopted competition law. Up to today, there are more than 130 jurisdictions which have established competition legal systems. The two representatives are the United States[1] antitrust law system and the European Union[2] competition law system. In their long development, the two competition law systems have been improved in their rigorous enforcement practices of competition law. This paper, therefore, chooses the enforcement of competition law as its subject.

Generally, the competition law regime is consisted of public enforcement and private enforcement. The term public enforcement indicates that public competition authorities carry out the competition. In contrast the term private enforcement describes the private action taken by victims of a competition infringement. This paper will discuss both the public and private enforcement of competition law.

Notwithstanding that competition law regulates competitions in a free market economy, China adopted its competition law, the Anti-Monopoly Law of the People's Republic of China[3], to regulate competitive conducts in its socialist market economy in 2008. After the Anti-Monopoly Law entered into force, the application of the Anti-Monopoly Law has gone a complex experience and played a limited role. In addition, the enforcement of the Anti-Monopoly Law met a great number of complex problems, and many of them were left to be solved.

Considering the fact that the Anti-Monopoly Law is modeled on the EU competition law, and the long-term communication between competition authorities of the EU and China,[4] this paper will try to find what China can learn from the EU in its application of competition law.

[1] Hereinafter referred to as US.
[2] Hereinafter referred to as EU.
[3] Hereinafter referred to as the Anti-Monopoly Law.
[4] Van Bael & Bellis, Competition Law of the European Union (Sixth Edition), 2021, Kluwer Law International, p181-182.

# Preface

With this thesis I finish my European Business Law studies in Lund. The one-year study program has given me the opportunity to study EU law under professional guidance and meet people from all over the world.

First of all, I would like to thank my supervisor, Prof. Carl Micheal von Quitzow, for your encouragement and guidance during the draft of my thesis, from the initial talks to the completion.

Secondly, I would like to address thanks to Prof. Kawashima Fujio, my tutor when I studied at Kobe University. Without your encouragement and help, I would not have come to Lund.

Furthermore, I would like to thank Dr. Wenxi Li for proofreading this thesis.

Finally, I would like to address my deepest gratitude to my dear parents and my dear friends: Weilin, Xuelinn, Xueyan and Yizhu. Although we live in different places in the world and have not met for a long time, l know all of you have always been there for me.

Hanrui Cai
In Lund
May 27, 2021

# Abbreviations

| | |
|---|---|
| AMR | Authority for Market Regulation |
| CFR | the Charter of Fundamental Rights of the European Union |
| EC | European Community |
| ECSC | European Coal and Steel Community |
| EEC | European Economic Community |
| EU | European Union |
| MOFCOM | Ministry of Commerce |
| NCA | National Competition Authority |
| NDRC | National Development and Reform Commission |
| SAIC | State Administration for Industry and Commerce |
| SAMR | State Administration for Market Regulation |
| SEA | Single Europe Act |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 Introduction

## 1.1 General

Studying EU competition law is the main motivation for choosing European Business Law as my major in Lund. When I came across the course of EU competition law, I was astonished by the sophisticated economics theories which established the EU competition law. Those theories were not easy to understand, and immediately, I fund myself interested in the practice of EU competition law.

Since I have studied Chinese law for four years and have been paying close attention to the practice of China's competition law in the past three years, the idea of making a comparison in relation to the application of competition law between the EU and China came into my mind.

This paper will introduce the development history of competition law in the EU and China, then turn to the enforcement part, and then compare issues existing in the application of competition law to suggest what can China learn from the EU.

## 1.2 Purpose and Delimitation

The purpose is to suggest China learning from the EU's experience in applying competition law. However, since the scope of competition law is quite broad, including antitrust rules, merger control provisions and, etc.,[5] the paper will focus on the enforcement of antitrust rules.[6]

In this paper, (a) the terms 'antitrust rules', 'anti-monopoly rules' and 'competition law' are used with synonymously, (b) the word 'Community' or 'Union' denotes the EU, and (c) Articles 85 and 86 EEC or Articles 81 and 82 EC are predecessors of present EU antitrust rules 'Articles 101 and 102 TFEU'.[7]

## 1.3 Method and material

The primary method used in the thesis is the legal dogmatic method. Analyzing primary and secondary sources of EU law in the area of

[5] Other than antitrust and merger control, rules of the rest vary from jurisdictions. For, example, EU competition law includes rules regulating State Aids, while China's competition law prohibits administrative monopolistic conducts.
[6] EU antitrust rules refers to Articles 101 and 102 TFEU, China's antitrust rules refers to provisions contained in Chapters 2 and 3 of the Anti-Monopoly Law of the People's Republic of China.
[7] Treaty of Rome/Treaty establishing the European Economic Community ( EEC Treaty). It was signed in 1957 and has been amended on a number of occasions. The Maastricht Treaty of 1992 remove the word 'economic' from the Treaty of Rome's official title (hereinafter referred to as EEC/EC Treaty). Today it is called the Treaty on the Functioning of the European Union, hereinafter referred to as TFEU.

legislation and enforcement of competition law. In addition, relevant publications and articles will be referred to as well.

The secondary method is the comparative method. EU has applied competition law for decades and accumulated a remarkable arrange of experiences, while China has been criticized for the lack of experience in enforcing its competition law.

The method of historical analysis and case studies will also be applied. In regard to the enforcement of competition law, it is necessary to recall its historical development both in the EU and China. Further, the case study is a good way to demonstrate the enforcement practice of competition law.

## 1.4 Outline

This thesis is structured as follows. Chapter one is the Introduction, illustrating the research background, subject, and purpose. Chapter two deals with the development history and practice of EU antitrust enforcement. Chapter three discusses the drafting history of China's Anti-Monopoly Law and its enforcement practice. Chapter four is the crucial part of the thesis, which is based on the discussion in chapters two and three. Chapter five will conclude the thesis.

# 2 EU ANTITRUST ENFORCEMENT

## 2.1 The Growth of Competition Law[8]

Competition law grew and developed in the North-American region. Competition legal systems operating in the US and EU are the two representative models in the world. In contrast, the first competition law was enacted in Canada dated May 2, 1889.[9] Although Canada first promulgated the competition law, it was used more frequently by the competition authorities in the United States since the Sherman Act entered into force in 1890.[10] Almost after 60 years, the competition law started to regulate market competition conduct in a few European countries. In 1957, six countries signed the EEC Treaty to set up the European Economic Community.[11] In order to ensure the effective operation of the Community, competition rules were drafted and contained in the Treaty. Since then, the EU competition law system was established and revised with the enlargement of the EU.

Since the 1980s, more and more jurisdictions started setting up their competition legal system based on the competitive legal system of the US or EU. According to the OECD[12], there are more than 130 jurisdictions owning competition law systems in the world now.[13]

So what is competition law? Jones and Surfin framed the competition law as [C]ompetition law is concerned with preventing restrictive agreements between firms, dealing with oligopolistic markets, preventing the anti-competitive consequences of the exercise of substantial market power, and preventing mergers which lead to concentrations in market power with anti-competitive effects.[14] Competition law can be understood as the law which regulates competitive conduct in a free market economy.[15] Whereas in some jurisdictions, such as China and Japan[16], the competition law is called as anti-monopoly law, the competition law is widely called by its American name ‘antitrust law’.

However, the term ‘antitrust’ in the context of EU competition law implies competition rules other than those in the area of merger control and State

[8] Richard Whish, David Bailey, Competition Law (9th Edition), 2018, Oxford University Press, p
[9] An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, also known as the Anti-Combines Act.
[10] Sherman Antitrust Act of 1890, the first antitrust law passed the US Congress. Hereinafter referred to as Sherman Act. For more antitrust laws of the US see Federal Trade Commission’s website at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, accessed May 10, 2021.
[11] See details of EEC Treaty on EUR-Lex’s website at https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=LEGISSUM%3Axy0023, accessed May 9, 2021.
[12] Organization for Economic Co-operation and Development.
[13] OECD’s website at www.oecd.org/competition.
[14] Alison Jones, Brenda Surfin, Niamh Dunne,Jones & Sufrin’s EU Competition Law, Text, Cases, and Materials (Seventh Edition), 2020, Oxford University Press, p2.
[15] Ibid.
[16] Japanese competition rules are contained in the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), the Japan Fair Trade Commission describes it as the Anti-Monopoly Act on its website at https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html, accessed May 10, 2021.

aid.[17] Generally, antitrust rules in the EU denote Articles 101 and 102 TFEU. The paper will follow this denotation, focusing on the antitrust practice in the EU and the corresponding practice in the context of China's Anti-Monopoly Law.

## 2.2 History and Development of EU Competition Law

Historically, the EU competition law was called EEC competition law under the EEC Treaty or EC competition law under the EC Treaty following the integration process of the EU. The idea of European integration originated in the nineteenth century, but the Second World War facilitated the integration process, and as a result, the European Economic Community was set up.[18] After having experienced 4 phases, the European Community became the European Union.[19] The four phases are: (a) from the European Coal and Steel Community[20] to the EEC; (b) from the EEC to the Single European Act[21]; (c) from the SEA to the Nice Treaty[22]; and (d) from Nice to the Lisbon Treaty[23].[24]

The development of EU competition law originated from the anti-competitive experience in the ECSC since 1952. And during the negotiation of the EEC Treaty, the ECSC anti-competitive experience was taken into consideration. In addition, national competition policies of EEC member states were an essential reference for the growth of EEC competition law. Furthermore, the EEC competition law also drew experience from the Sherman Act.[25] Finally, EU competition rules were added to the EEC Treaty. However, EU competition provisions have been renumbered two times because of the integration of Europe and the revision of the Treaty containing them. Present EU competition rules are contained in Chapter 1 Title VII of Part Three of the TFEU. Core provisions are Articles 101 and 102 TFEU.[26] Articles 101 to 106 are rules applying to undertakings, 107 to 109 are rules in relation to State Aids. In addition to the ten Treaty articles,

[17] Ekaterina Rousseva (ed), EU Antitrust Procedure, Oxford University Press, 2020, p4.
[18] Paul Craig, Gráinne de Búrca, EU Law: Texts, Cases and Materials (Seventh Edition), 2020, Oxford University Press, p2.
[19] Ibid, P3-22.
[20] *Hereinafter referred to as ECSC.*
[21] Hereinafter referred to as SEA.
[22] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, hereinafter referred to as Nice Treaty.
[23] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, hereinafter referred to as Lisbon Treaty.
[24] Paul Craig, Gráinne de Búrca, EU Law: Texts, Cases and Materials (Seventh Edition), 2020, Oxford University Press, p3-19.
[25] Kiran Klaus Patel and Heike Schweitzer, Historical Foundations of EU Competition Law, 2013, Oxford University Press, p5.
The introduction of EU competition law also refers to Paul Craig, Gráinne de Búrca, EU Law: Texts, Cases and Materials (Seventh Edition), 2020, Oxford University Press, p76.
[26] Their former articles are 85 and 86 EEC, and 81 and 82 EC.

the EU Merger Regulation[27] is an important supplemental instrument to EU competition law.[28]

## 2.3 EU Antitrust Enforcement

Substantive EU antitrust rules denote Article101 and 102 TFEU, and EU antitrust enforcement implies the application of the two articles. Article 101 prohibits agreements, decisions by associations of undertakings, and concerted practices that have as their object or effect the restriction of competition. Article 102 prohibits an undertaking or undertakings abusing a dominant position.

In the following sections, this paper will demonstrate the legal framework of EU antitrust enforcement and the main actors involved in EU antitrust enforcement.

### 2.3.1 Legal Framework

The tools to enforce Articles 101 and 102 TFEU, antitrust procedural rules are mainly handled by secondary law and soft laws, such as Commission notices and informal guidance. Soft laws deal with handling of complaints, regulating access to files, balancing the cooperation between the EU and national level, including the operation of the European Competition Network and collaboration with the court system.[29] In addition, rules regarding fines, leniency, the settlement procedure in cartel cases, and proceeding procedures concerning Articles 101 and 102 TFEU are also well enacted.[30] However, with regards to the application of Articles 101 and 102 TFEU in Member States, the principle of national procedural autonomy shall be taken into consideration.

The enforcement of competition law by the Commission is primarily governed by Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82,[31] which replaced Regulation 17/1962[32] in 2004. Other regulations, notices and guidelines provide detailed guidance for the Commission to enforce competition law effectively, including Commission Regulation (EC) No 773/1004 relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 EC,[33] Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 EC,[34] Commission Notice on the Rules for Access to the Commission File in Cases Pursuant to

[27] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.
[28] Richard Whish, David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press, p51-2.
[29] Official titles of these rules are listed in the following paragraph.
[30] See Article 103 (2) TFEU.
[31] OJ L 1, 4.1.2003. Hereinafter referred to as Regulation1/2003.
[32] EEC Council Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962.
[33] OJ L 123, 27.4.2004. Hereinafter referred to as Regulation 773/2004.
[34] OJ C 101, 27.4.2004. Hereinafter referred to as Complaints Notice.

Articles 81 and 82 EC, Articles 53, 54 and 57 of the EEA Agreement and the Council Regulation (EC) No 139/2004,[35] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases,[36] Commission Notice on Cooperation within the Network of Competition Authorities,[37] Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 that Arise in Individual Cases,[38] Guidelines on the Method of Setting Fines Imposed Pursuant to Articles of Regulation No 1/2003,[39] Commission Notice on the Conduct of Settlement Procedures in Cartel Cases,[40] Commission Notice on the Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU,[41] Commission Antitrust Manual Procedures for the Application of Articles 101 and 102 TFEU,[42] Explanatory Note to An Authorization to Conduct An Inspection in Execution of a Commission Decision under Article 20(4) of Council Regulation No 1/2003,[43] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition law Provisions of the Member States and of the European Union,[44] and Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to Empower the Competition Authorities of the Member States to Be More Effective Enforcers and to Ensure the Proper Functioning of the Internal Market.[45]

Among the above-mentioned, Regulation 17/1962, Regulation 1/2003, Regulation 773/2004, Damages Directive, and ECN Plus Directive play an important role in the application of EU antitrust rules.

### 2.3.2 Main Actors

This section will make reference to EU institutions involved in the establishment and application of EU competition law.[46]

(i) The Council of the EU[47]

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[35] OJ C 325, 22.12.2005. Hereinafter referred to as Access to File Notice.
[36] OJ C 298, 8.12.2006. Hereinafter referred to as Immunity and Reduction Notice.
[37] OJ C 101, 27.4.2004. Hereinafter referred to as ECN Cooperation Notice.
[38] OJ C 101, 27.4.2004. Hereinafter referred to as Guidance Letters Notice.
[39] OJ C 210, 1.9.2006. Hereinafter referred to as Fines Guideline.
[40] OJ C 167, 2.7.2008. Hereinafter referred to as Cartel Cases Settlement Notice.
[41] OJ C 308, 20.10.2011. Hereinafter referred to as Best Practice Notice.
[42] Hereinafter referred to as Antitrust Manual Procedures. Full text is available at http://publications.europa.eu/resource/cellar/cd7d54b9-dd45-45fb-94e9-7d761533a8b1.0001.03/DOC_1, accessed May 9, 2021.
[43] Hereinafter referred to as Explanatory Note. Full text is available at https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf, accessed May 10, 2021.
[44] OJ L 349, 5.12.2014. Hereinafter referred to as Damages Directive.
[45] OJ L 11, 14.1.2019. Hereinafter referred to as ECN Plus Directive.
[46] Richard Whish and David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press, p51-58; Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p77-84; and Paul Craig, Gráinne de Búrca, EU Law: Texts, Cases and Materials (Seventh Edition), 2020, Oxford University Press, p60-96.
[47] Richard Whish and David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press p54; and Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p77.

Pursuant to Article 16(1) TFEU, the Council of the European Union exercises legislative function, carries out policy-making and coordinating functions as laid down in the Treaties. Instead of involving in competition policy on a regular basis, the Council only adopts major pieces of legislation or acts with the European Parliament. Generally, the Council delegates powers to the Commission to enforce competition principles contained in the TFEU.

(ii) The European Parliament[48]

According to Articles 14(1) and 16(1) TEU[49], the European Parliament enjoys co-equal status with the Council of the EU. It is consulted on matters of competition policy and may influence the legislative process of competition rules.

(iii) The Commission[50]

Article 105 TFEU states that the Commission shall ensure the application of Articles 101 and 102 TFEU. Hence, the Commission is liable for investigating any violation of EU competition law, imposing penalties, adopting block exemption regulations, and developing competition policies or legislative initiatives. One of the Commissioner is liable for competition matters and entitled to take certain decisions directly. Under the Commissioner, two Hearing Officers in charge of safeguarding the exercise of procedural rights during Commission proceedings when enforcing EU competition law. DG COMP is the Directorate of the Commission, mainly in charge of making competition policies.

(iv) EU Court[51]

EU court system is consisted of the General Court[52] and the Court of Justice[53]. The General Court hears appeals against the Commission decisions relating to competition matters under Articles 101 and 102 TFEU, reviews the legality of the Commission decisions in light of Articles 261, 263, and 265 TFEU,[54] and decides to annul a decision or alter the amount of any fine after assessing the evidence.[55] The Court of Justice hears appeals from the General Court and cases referred to it from national courts or tribunals on the ground of Article 267 TFEU. The difference in relation to the judicial review by the General Court and the Court of Justice is that the

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[48] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, P78.

[49] Consolidated Version of the Treaty on European Union [2012] OJ C 326/26, hereinafter referred to as TEU.

[50] Richard Whish and David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press, p54-55; Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p78.

[51] Richard Whish and David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press, p56; Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p81-3.

[52] The court of the first instance.

[53] The appellate court.

[54] The Court of Justice held that EU institutions are subject to the possibility of judicial review of their actions in Case 294/83 Les Verts v European Parliament, ECLI:EU:C:1986:166, para. 23.

[55] Renato Nazzini, 'Administrative enforcement, judicial review and fundamental rights in EU competition law: A comparative contextual functionalist perspective' (2012) 49 CML Rev 971-1005.

General Court carries out an exhaustive review of all legal and factual elements and the application of the law to the facts,[56] while the Court of Justice only deals with appeals on the point of law, not on the facts. As regards the amount of the fine, the EU Courts have unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation 1/2003, i.e., EU Courts are competent to change the Commission's decision by striking out, lowering, or increasing the level of the fine. The Court of Justice has emphasized that the unlimited jurisdiction is confined to determining the amount of fine, which shall not be extended to altering the facts as found by the Commission.

(v) NCAs[57]

Article 3(1) of Regulation 1/2003 grants National Competition Authorities the power to apply Articles 101 and 102 TFEU when anti-competitive conduct affects trade between Member States. The Regulation decentralized the power of EU competition law enforcement, which had long been held by the Commission, and created a parallel enforcement system. Competent authorities of Member States are empowered to involve in the application of EU competition law to Member States.

(vi) National Courts[58]

Since Articles 101 and 102 are directly applicable, individuals are entitled to claim losses suffered from anti-competitive conduct before national courts. In addition, Regulation 1/2003 indicates that national courts are possible to play in EU competition law enforcement as NCAs.

## 2.4 Public enforcement[59]

EU competition law enforcement regime can be divided into two types: public and private enforcement. With regard to public enforcement, reference will be made to Regulation 1/2003 and its former Regulation 17/1962, and the ECN Plus Directive. Historically, the public power of enforcing EU competition law was centralized on the Commission under Regulation 17/1962. The single public enforcement regime was replaced by the latter Regulation 1/2003 with a parallel public enforcement regime. In addition, detailed rules on different aspects of public enforcement drafted by the Commission will be taken into consideration in this section as well.

### 2.4.1 Procedural Legal Framework

In this section, the paper will mainly introduce Regulation 17/1962, Regulation 1/2003, and ECN Plus Directive.

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[56] Article 263 TFEU.

[57] Richard Whish and David Bailey, Competition Law (Ninth Edition), 2018, Oxford University Press, p57.

[58] Ibid.

[59] This section refers to Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p872-1014.

(i) Regulation 17/1962

In order to establish a system regulating the competition in the common market within the EU, the EU promulgated Regulation 17/1962. It was the first legislative act to implement Articles 101 and 102 TFEU (at the time Articles 85 and 86 EEC, respectively) for the purpose of securing uniform application of the two articles. Under Regulation 17/1962, the European Commission[60] was appointed as the public enforcer of the EU competition law. The Commission was empowered to require cooperation from the competent authorities of Member States,[61] to address recommendations and decisions to undertakings or associations of undertakings,[62] and to impose fines and periodic penalty payments on undertakings or associations of undertakings.[63] Also, it respects parties' right to be heard by the Commission and the right to have full and effective judicial review.[64]

(ii) Regulation 1/2003

In light of experience and in order to meet challenges in a much more integrated common market, Regulation 17/1962 was replaced by Regulation 1/2003.[65] For the purpose of securing a balance between ensuring effective supervision of Articles 101 and 102 TFEU and simplifying administration to the greatest extent, Regulation 1/2003 redefined the structure of the EU enforcement regime.[66] Two key aims of Regulation 1/2003 are: (a) replacing the 'centralized scheme set up by Regulation 17/1962' with a 'directly applicable exception system';[67] and (b) establishing the ECN whereby the Commission and national competition authorities shall apply the EU competition rules in close cooperation.[68] While Regulation 1/2003 decentralized the enforcement of the EU competition rules, it strengthened the Commission's existing investigative powers.[69] As a result, the Commission is equipped with the power to adopt new types of decisions and empowered to make further secondary legislation in relation to practical measures to implement Regulation 1/2003,[70] for example, the Commission adopted Regulation 773/2004 to regulate the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU.[71]

Particularly, one meaningful change made by Regulation 1/2003 is provided in recital 15, 'the Commission and the competition authorities of the Member States should form together a network of public authorities.' The establishment of the ECN led to the adoption of the ECN Plus Directive.

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[60] Hereinafter referred to as the Commission.
[61] Recitals 7-8 and Articles 9-11.
[62] Recitals 9-10 and Articles3, 7, 11, 14.
[63] Articles 15-16.
[64] Recitals 11-12 and Article 17.
[65] Recitals 2-3 of Regulation 1/2003.
[66] Ibid.
[67] Recitals 3-4 and 7.
[68] Recital 15.
[69] Recital 25
[70] Recitals 11 and 14.
[71] It laid down rules concerning the initiation of proceedings by the Commission, the handling of complaints, and the hearing of the parties concerned.

(iii) ECN Plus Directive[72]
Regulation 1/2003 decentralized public enforcers for EU competition law and introduced the ECN for the purpose of ensuring effective enforcement of EU competition rules. Under this situation, national competition authorities of one Member State are able to apply EU competition law by themselves or cooperating with competition authorities of the other Member States or the Commission. Considering the diversity of public competition enforcers, the EU adopted the ECN Plus Directive to secure the coherent enforcement of its competition rules. The Directive has just recently been transposed into Member States, and its effect is expected to be examined in the future.

### 2.4.2 Enforcement at EU level

The Commission plays several roles in ensuring a good function of the EU. In the context of EU competition law, the Commission is empowered to propose legislative acts and competition policies and to ensure the application of EU competition rules.[73] To this end, the Commission may initiate an investigation when it suspects competitive conduct constituting an infringement of Articles 101 and 102 TFEU and bring the infringement to an end. In this section, the paper will introduce the general enforcing process: (i) initiation of an investigation, (ii) investigation stage, and (iii) decision-making stage. The procedure relating to fines, periodic penalty payments, and leniency will be saved in this thesis.

(i) Initiation of an investigation[74]
According to provisions contained in Regulation 1/2003 and Regulation 773/2004, investigations can be triggered by four types. (a) The Commission may investigate out of its own initiative when monitors market operation. (b) Leniency applications submitted by the parties to an agreement or practice may suggest a possibility of investigation. (c) Complaints concerning breaches of competition law by third parties. (d) Cases transferred to the Commission from competent authorities of Member States.

(ii) Investigation process[75]
Broadly the Commission can investigate in three ways. (a) Making written requests for information (b) Carrying out inspections at premises of an undertaking or private premises. (c) Interviewing natural or legal persons of undertakings concerned.

In the first, requests for information can be addressed to a wide range of persons, including "parties under investigation, complaints, competitors,

[72] Reference will be made to Ekaterina Rousseva(ed), EU Antitrust Procedure, 2020, Oxford University Press, part VIII.
[73] Articles 103, 105, and 106(3) TFEU.
[74] Ekaterina Rousseva(ed), EU Antitrust Procedure, 2020, Oxford University Press, p17; and Article 5 of Regulation 1/2003.
[75] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p895-910.

customers of the parties under investigation or other third parties".[76] The Commission can request a great range of information as long as the Commission considers it is relevant to the case under investigation.[77] Nonetheless, the Commission cannot ask self-incriminatory questions which may compel an undertaking to admit an infringement to Article 101 or 102 TFEU.[78] Parties under investigation are entitled to access to all information gathered by the Commission during an antitrust investigation stage subject to the protection of professional secrecy.[79]

Secondly, concerning inspections, the Commission is entitled to enter premises, examine business records, take copies of business records, seal premises and documents, and ask staff questions during the inspection under Regulation 1/2003 and Regulation 773/2004.[80] The Commission is even empowered to search business records at private premises if it has reasonable suspicion.[81] If an undertaking is required to cooperate with an inspection but provides incomplete, false, or misleading business records or information, the Commission can impose fines or periodic penalty payments.[82]

The third investigative tool available to the Commission is the power to interview and take statements from natural or legal persons with the interviewee's consent.[83] The requirement of approval means that the Commission cannot compel a person to accept an interview or make statements, nor can it fine a person for providing incomplete or misleading information.

(iii) Decision-Making Stage

The Commission may not investigate in every case.[84] Once the proceedings have been formally opened, the proceedings move to the inter partes stage.[85] During this stage, the Commission shall inform 'parties to the investigation'[86] and respect their rights listed in procedural rules (e.g., the right not to incriminate oneself, the right to privacy, the right to access to a lawyer, the right to protection of business secrets).[87]

If the investigation confirms the Commission's competition concerns, the Commission will issue a Statement of Objections (SO) and notify its addressees. The SO sets out the Commission's preliminary finding of an infringement to Articles 101 or 102 TFEU and the behavioral or structural

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[76] Ekaterina Rousseva(ed), EU Antitrust Procedure, 2020, Oxford University Press P21.
[77] Article 18(1) of Regulation 1/2003.
[78] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p911.
[79] Article 28 of Regulation 1/2003.
[80] Article 20 of Regulation 1/2003.
[81] Article 21 of Regulation 1/2003.
[82] Article 18.
[83] Article 19 of Regulation 1/2003.
[84] Case T-24/90, Automec Srl v Commission EU:T:1992:97, para. 85.
[85] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, P920-931.
[86] Those suspected by the Commission for infringements of competition rules.
[87] Regulation 1/2003, Art. 27(2); Regulation 773/2004, Arts 11–12, 14–15.

remedies that the Commission intends to impose on the addressees to bring the alleged violation to an end.[88]

During an antitrust investigation, the Commission may decide to terminate its proceedings when the undertakings concerned to commit to meet concerns expressed in the Commission's preliminary assessment and bring infringements to an end.[89] However, the Commission may reopen the proceedings if one of the conditions listed in Article 9(2) of Regulation 1/2003 is satisfied.

While researching antitrust procedures, the phenomenon that parties under an antitrust investigation in the EU are more willing to appeal against public enforcers if they believe that they have not been treated equitably following legal rules than those in China. Various cases indicate that EU parties have appealed against enforcers' powers like inspection powers[90] or appeal for not having been treated reasonably, for example, the right of access to file[91] and internal documents and evidence[92]. By contrast, it is rare to find similar cases in China. This phenomenon will be discussed in chapter 4 of this thesis.

### 2.4.3 Enforcement at National Level

Since Regulation 1/2003 decentralized the public enforcing power of EU competition law and empowers Member States to designate authorities with administrative or judicial nature as authorities to enforce EU competition law, this section will illustrate how the administrative or judicial agencies apply EU competition law to a Member State.

(i) Enforcement by NCAs

Regulation 1/2003 confirmed the decentralization of EU competition law enforcement and created a parallel enforcement system in which Articles 101 and 102 TFEU are enforced via the ECN. EU competition authorities are composed of the Commission and competent authorities of Member States. Under Article 35 of Regulation 1/2003, competent authorities of Member States in charge of applying Community competition rules can be administrative or judicial authorities. Under Regulation 1/2003, national competition authorities are empowered to involve in the application of EU competition law. In light of the principle of national procedural autonomy, NCAs shall follow national procedural rules when investigating cases falling within the scope of EU competition law. However, divergences

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[88] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p921-922.
[89] Article 9 of Regulation 1/2003.
[90] In Hoechst AG v Commission, Hoechst AG was imposed on a periodic penalty payment by the Commission for refusing inspection, then Hoechst AG appealed against the decision.
[91] In Hercules Chemicals NV v Commission, Hercules appealed to the Court of Justice arguing that the General Court erred in not examining the legality of the Commission's refusal to allow Hercules to access to specific files.
[92] In Case CDC Hydrogene Peroxide v Commission, the Commission rejected CDC Hydrogene Peroxide's application for full access to the statement of contents of the case-file, then CDC Hydrogene Peroxide appealed to the General Court.

among national procedural enforcement systems and standards raise practical problems.

Hence, to secure the effective and uniform application of EU competition law, Regulation 1/2003 created the ECN to enable cooperation between the Commission and NCAs in investigations and ensure mutual recognition of each Member State's enforcement system and standard. Furthermore, to ensure that NCAs have the necessary powers and resources to apply Articles 101 and 102 TFEU effectively,[93] the ECN Plus Directive was adopted to 'empower national competition authorities to be more effective enforcers' and ensure the proper operation of the internal market.' The Directive has been transposed into Member States' legal orders by February 2021.

(ii) National Courts as Complementary Enforcers

Regulation 1/2003 confirmed that national courts could be entrusted to enforce Community competition law.[94] Hence, national courts play in EU competition law enforcement at three various levels and in three different capacities. First, national courts can be designate to apply the EU competition law by a Member State under Article 35 of Regulation 1/2003. Secondly, national courts only exercise general jurisdiction over civil lawsuits with Articles 101 and 102 at first instance or on appeal.[95] Thirdly, national courts may be appointed to review on appeal the decisions made by the domestic NCAs, regardless of whether such decisions are of an administrative or judicial nature (the role of judicial review).

## 2.5 Private Enforcement

Private antitrust litigation allows victims who have suffered loss from conduct that infringed rules to claim compensation. It is considered as a supplement to public enforcement by ensuring breaches of competition rules are brought to an end and distortions of competition are deterred.[96] Private litigation began to burgeon in the 1960s in the US.[97] A study of 60 US antitrust cases published by Professors Davis and Lande found that over 33.8 billion US dollars were compensated for anti-competitive conduct.[98] One possible reason is that the Clayton Act[99] encourages private enforcement of the antitrust laws.

On the contrary, until the adoption of the Damages Directive, the EU has the first legislation to regulate private actions for infringements of Articles 101 and 102 TFEU. The Directive harmonizes part of national laws governing claims for compensation to establish a level playing field across the Member

[93] Recital 3 of ECN Plus Directive.
[94] Recital 35 and Article 35 of Regulation 1/2003.
[95] These courts hear disputes between private parties relating to the performance of contracts, injunctions, and claims for damages between parties for losses suffered as a result of a breach of EU antitrust principles.
[96] Alison Jones, Brenda Surfin, Niamh Dunne, Jones & Sufrin's EU Competition Law: Texts, Cases, and Materials (Seventh Edition), 2019, Oxford University Press, p1019.
[97] Ibid, p1024.
[98] Ibid, p1026-1027.
[99] Clayton Antitrust Act of 1914.

States, balances effective cooperation between public and private enforcement, and explicitly indicates that all antitrust victims shall claim compensation in full.[100]

Prior to the Damages Directive, private rights of action derived from the jurisprudence of the CJ. In 1974, the Court of Justice held that Articles 101 and 102 have direct effect in Belgische Radio en Televise v SV SABAM.[101] In addition, the Court of Justice held in case Walt Wilhelm v Bundeskartellamt[102] that national courts must provide effective judicial protection of rights deriving from directly enforceable Treaty provisions and give them precedence over conflicting principles of national law in 1969. Since then, it is possible to claim damages resulting from infringements of EU competition law.

In respect of procedural enforcement in the context of private actions, litigation relating to vindication or protection of rights derived from EU competition law before national courts was dependent on national laws in the absence of implementation of the Damages Directive, pursuant to the principle of national procedural autonomy.[103]

# 3 CHINA ANTI-MONOPOLY ENFORCEMENT

## 3.1 History and Development of China's Anti-Monopoly Law

On August 1, 2008, China enacted its newly codified competition rules, the Anti-Monopoly Law. Before adopting Anti-Monopoly Law, China experienced a long legislative history of developing rules concerning market competition. Shang Ming[104] indicated that the legislative process of China's competition rules could be divided into three stages.[105]

There was no competition in China at the first stage since its economy was operated under national planning. The second stage lasted from 1978[106] to 1992. In 1992, China decided to establish a socialist market economy system. During these 14 years, a limited competition was allowed to take place. The third stage is the most important one. Numerous laws, regulations, administrative rules, and regulatory instruments concerning competition have been enacted, such as the Anti-Unfair Competition Law[107],

[100] Ibid, p 1019.
[101] Case 127/73, EU:C:1974:25, para. 16.
[102] Case 14/68, EU:C:1969:4, para. 9.
[103] Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland EU:C:1976:188, para. 5.
[104] At the time the director general of the anti-monopoly bureau at the Ministry of Commerce of the People's Republic of China.
[105] Antitrust in China–a constantly evolving subject, Shang Ming, COMPETITION LAW INTERNATIONAL February 2009.
[106] The year of 1978 is the starting point of China's Reform and Opening-Up Policy.
[107] Anti-Unfair Competition Law of the People's Republic of China. It was promulgated by the Standing Committee of the National People's Congress in 1993, revised on November 4, 2017.

Consumer Protection Law[108], Price Law[109], Provisions of State Council on Prohibiting Regional Blockades in Market Economy Activities[110], and Decisions of the Stated Council on Rectifying and Standardizing the Order in the Market Economy[111], etc.

In 1993, the drafting work of Anti-Monopoly Law was delegated to the State Administration for Industry and Commerce[112] and the Ministry of Commerce[113]. In 1997, the administration of the newly-enacted Price Law was entrusted to the National Development and Reform Commission[114], which thus emerged as an essential player on the antitrust scene. The power struggle within the Chinese government, especially between the three administrations, impeded the drafting of the Anti-Monopoly Law.

Under this situation, China's entry into the World Trade Organization works as the main external power to facilitate the adoption of its Anti-Monopoly Law.[115] The SAIC, MOFCOM (then called the Ministry of Foreign Trade and Economic Cooperation), and NDRC began to draft various pieces of legislation, both separately and jointly. In 2003, the State Council Legislative Affairs Office joined to coordinate administrative work and facilitate the drafting process.[116] Finally, the Anti-Monopoly Law was passed by China's National Congress in 2007 and entered into force on August 1, 2008.

## 3.2 China Anti-Monopoly Enforcement

In accordance with the fact that the SAIC, MOFCOM, and NDRC had been involved in the drafting of Anti-Monopoly Law and had drafted various pieces of competition legislation both separately and jointly to implement the Anti-Monopoly Law, the anti-monopoly practice in China was quite complex. In order to understand how the Anti-Monopoly Law is enforced in China, this section will illustrate its legal framework and the main actors involved.

### 3.2.1 Legal Framework

The Legal system of China is defined as a socialist legal system. The Constitution of the People's Republic of China is the highest law and the

[108] Law of the People's Republic of China on Protection of Consumer Rights and Interests. It was adopted by the Standing Committee on October 31, 1993, and entered into force as of January 1, 1994.
[109] Price law of the People's Republic of China. It was promulgated by the Standing Committee on December 29, 1997.
[110] Issued by order of State Council of the People's Republic of China on April 21, 2001. Revised by Decisions of the State Council on Abolishing and Amending Some Administrative Regulations on August 1, 2011.
[111] Issued by the State Council on April 27, 2001.
[112] Hereinafter referred to as SAIC.
[113] Hereinafter referred to as MOFCOM.
[114] Hereinafter referred to as NDRC.
[115] Roger Zäch, Andreas Heinemann, Andreas Kellerhals (ed), The Development of Competition Law: Global Perspectives, 2010, Edward Elgar Publishing, p155.
[116] China's new anti-monopoly law: towards a new competition regime, Guillaume Rougier-Brierre and Arnaud Lunel, Journal Article, International Business Law Journal, I.B.L.J. 2008, 2, p185-205.

mother law of various subordinate department laws.[117] Under the Legislation Law of the People's Republic of China[118], official sources of law include laws, administrative regulations, local regulations, administrative rules, and military regulations. The National People's Congress and its Standing Committee are the legislative bodies of China.[119] In light of the Anti-Monopoly Law, the Anti-Monopoly Commission under the State Council is responsible for organizing, coordinating, and guiding anti-monopoly work. Authorities specified by the State Council are liable for the enforcement. One of the Anti-Monopoly Commission's responsibilities is formulating and releasing anti-monopoly guidelines.[120] And under Legislation Law, competent competition authorities may draft administrative rules to guide anti-monopoly work.[121] Therefore, other than provisions in the Anti-Monopoly Law, China's anti-monopoly rules shall include guidelines promulgated by the Anti-Monopoly Commission and administrative rules published by competent competition authorities.

As mentioned above, there were three administrative departments under the State Council responsible for enforcing ministerial decrees to regulating market competition before adopting anti-monopoly law. The three administrations continued to be in charge of anti-monopoly after adopting the Anti-Monopoly Law. They shared the enforcing power of the Anti-Monopoly Law in their respective fields. SAIC was liable for prohibiting monopoly agreements, abuse of dominant position, and abuse of administrative power which may eliminate or restrict competition (excluding price monopolistic conduct). MOFCOM was in charge of the antitrust review of concentrations between undertakings, guiding undertakings on response to antitrust complaints, exchanging competition policy and cooperation in bilateral and multilateral fora, and the operational work of the anti-monopoly commission. NDRC was in control of detecting and sanctioning monopolistic conduct concerning price.[122]

The decentralized enforcement regime blocked the application of the Anti-Monopoly Law. As a result, China reorganized its competition authorities and transferred the decentralized enforcement powers to the newly set up department, the State Administration for Market Regulation,[123] on March 17, 2018. The three administrations are no longer liable for anti-monopoly work since then. Reference will not be made to any administrative rules drafted by the them other than those that SAMR has succeeded.

Guidelines enacted by the Anti-Monopoly Commission are as follows: (a) Guidelines for the Definition of the Relevant Market, (b) Antitrust

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[117] The present Constitution Law was adopted in 1982 with further revisions in 1988, 1993, 1999, and 2004.
[118] It was passed by the Standing Committee on April 29, 2000, and went into effect on September 1, 2000. Hereinafter referred to as Legislation Law.
[119] Article 7.
[120] Articles 9-10.
[121] Article 80.
[122] More information see Chinese competition law - the year 2015 in review, Adrian Emch, Jiaming Zhang*, Journal Article, Global Competition Litigation Review, G.C.L.R. 2016, 9(1), 30-37.
[123] Hereinafter referred to as SAMR.

Guidelines for the Platform Economy Industry, (c) Antitrust Guidelines for Auto Sector, (d) Guideline for Countering Monopolization in the Field of Intellectual Property Rights, (e) Guideline for the Commitments Made by Undertakers in Monopoly Cases, and (f) Guideline for the Application of Leniency for Horizontal Monopoly Agreement Cases.[124]

The package of SAMR rules are as following: (a) Interim Measures for hearing of administrative penalty in market supervision and Administration, (b) Interim Provisions on Prohibiting Monopoly Agreements, (c) Interim Provisions on Prohibiting Abuse of Dominant Market Positions, (d) Interim Provisions on Law Enforcement Supervision, (e) Interim Provisions on Administrative Penalty Procedures, and (f) Provisions on Procedural Rules for Drafting SMAR Norms.[125] The following section will illustrate the history of the three authorities and the story of reorganization.

In addition to norms mentioned above, reference will be made to other laws concerning enforcement of Anti-Monopoly Law, such as Civil Procedure Law of the People's Republic of China,[126] Law of the People's Republic of China on Administrative Penalty,[127] Administrative Litigation Law of the People's Republic of China,[128] Administrative Reconsideration Law of the People's Republic of China,[129] and Regulation of the People's Republic of China on the Disclosure of Government Information[130].

### 3.2.2 Main Actors

In applying anti-monopoly law, the main actors involved are Anti-Monopoly Commission, the SAMR, the AMRS, and competent courts.

(i) Anti-Monopoly Commission
In light of Article 9 of Anti-Monopoly Law and Article 80 of Legislation Law, the Anti-Monopoly Commission under the State Council is in charge of organizing, coordinating, and guiding anti-monopoly work. Its responsibilities are as follows: (1) studying and drafting policies on competition; (2) organizing investigation and assessment of competition on the market as a whole and publishing assessment reports; (3) formulating and releasing anti-monopoly guidelines; (4) coordinating administrative enforcement of the Anti-Monopoly Law; and (5) other duties as prescribed by the State Council.

(ii) AMRs
While the Anti-Monopoly Commission is not responsible for the application of Anti-Monopoly Law, the authority specified by the State Council shall be

[124] SAMR issued China Anti-Monopoly Enforcement Annual Report of 2019 on December 25, 2020. The full text is available at http://www.samr.gov.cn/xw/zj/202012/t20201224_324676.html, accessed May 10, 2021. See p81-92 of the report.
[125] Ibid, p92-113.
[126] Hereinafter referred to as Civil Procedure Law.
[127] Hereinafter referred to as Administrative Penalty Law.
[128] Hereinafter referred to as Administrative Litigation Law.
[129] Hereinafter referred to as Administrative Reconsideration Law.
[130] Hereinafter referred to as Disclosure of Government Information Regulation.

liable for enforcement.[131] Since the authorities for enforcement of the Anti-monopoly Law under the State Council have been reformed in 2018, present public enforcers are the AMRs[132] and the SAMR.[133]

(iii) SMAR[134]

To improve the efficiency of the application of AML, streamline anti-monopoly rules and eliminate duplication of anti-monopoly work, the National People's Congress announced a reshuffle of government bodies dated March 17, 2018. On August 9, SAMR was officially set up. SAMR succeeds the enforcing responsibilities of the Anti-Monopoly Law previously conferred on SAIC, MOFOCOM, and NDRC. Now the SAMR and MARs are in charge of public enforcement of the Anti-Monopoly Law. besides regulating anti-monopoly conduct, the SAMR and AMRs also supervise drug and food safety, issue business licenses, and protect intellectual property.[135]

(iv) Courts

With respect to courts, there are four levels in the Chinese court system under Article 2 of the Law of Organization of the People's Courts of Peoples' Republic of China.[136] The four levels are (a) the Grass-roots People's Court; (b) Intermediate People's Courts; (c) High People's Courts; and (d) Supreme People's Courts.[137] In addition to these general courts, there are special courts such as Military Courts, Maritime Courts, Railway Transportation Courts, and Finance Courts.[138] In recent years, there are two changes made to the court system structure in China, the newly set up Intellectual Property Court and Circuit Court.[139] According to the Regulation on Cause of Civil Action Issued by the Supreme Court in 2008, an anti-monopoly civil action shall be heard by the trial chamber of intellectual property of any competent court. Since the Intellectual Property Court setup started in 2014, the Intellectual Property Court has jurisdiction over anti-monopoly civil cases.

In addition, the Supreme People's Court will issue judicial interpretation as guidance to instruct the trial work in subordinate courts, and the Supreme People's Court will select and publish symbolic cases to affect its subordinate courts in handling similar cases.[140]

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[131] Article 10 of the Anti-Monopoly Law.
[132] AMRs are the proper departments of the people's governments of provinces, autonomous regions, or municipalities directly under the Central Government.
[133] The subordinate agencies of the SAMR are called as Authorities for Market Regulation, and hereinafter referred to as AMRs.
[134] SAMR reform information is available at https://www.ropesgray.com/en/newsroom/alerts/2018/04/Chinas-New-State-Market-Regulatory-Administration-What-to-Know-and-What-to-Expect, accessed May 10, 2021.
[135] The Anti-Monopoly Bureau under the SAMR undertakes the anti-monopoly work.
[136] It was passed by the National Congress on July 1, 1979 and entered into force on January 1, 1980. Hereinafter referred to as Organization law of Courts.
[137] Articles 12 and 13 of the Organization Law of Courts.
[138] Article 15 of the Organization Law of Courts.
[139] Article 19 of the Organization Law of Courts.
[140] Article 18 of the Organization Law of Courts.

## 3.3 Public Enforcement

Likewise, according to Articles 9, 10, 50, and 53 of the Anti-Monopoly Law, China's competition law enforcement regime also consists of public and private enforcement. With regards to public enforcement, the paper will focus on the investigative process and summarize relevant cases.

In the EU, the Treaty contains competition provisions but not covers procedural requirements. The Council and the Commission are conferred to draft regulations or directives giving effect to substantive competition provisions.[141] There is a bundle of rules available for the Commission and national competition authorities when they apply the EU competition law[142]. EU procedural rules for competition enforcement are pretty detailed and comprehensive. Whereas some of them are binding and the other work as guidance in handling anti-competitive conduct, the EU provides an important lesson for China.

Unlike the detailed and complete legal framework for procedural enforcement of competition law, the procedural enforcement framework in China is not as comprehensive as the EU.

Concerning the procedural enforcement framework, one prominent character is that the competition law of China itself provides substantive competition rules and contains enforcement provisions. The Anti-Monopoly Commission and SAMR also publish rules to implement the Anti-Monopoly Law more effectively. Relevant rules include two guidelines drafted by the Anti-Monopoly Commission and four interim provisions made by SAMR.[143] In addition, other laws, such as the Administrative Penalty Law, the Administrative Litigation Law, the Administrative Reconsideration Law, and the Disclosure of Government Information Regulation, may be referred.

Despite the insufficient procedural rules for public enforcement, the general process can be divided into three stages and summarized as follows.

(i) Initiation of Investigation
Article 38 of the Anti-Monopoly Law states two ways to trigger an anti-monopoly investigation into suspected monopoly conduct. SAMR and AMRs may initiate the investigation out of their own will when they monitor competition, and the other is the complaint made by any party.[144] In

[141] Article 103(1) TFEU.
[142] Procedures for competition law enforcement promulgated by the Council and the Commission are listed in chapter 2.
[143] The two guidelines are Guideline for the commitments made by undertakings in monopoly cases and Guideline for applying leniency for horizontal monopoly agreement Cases. Four interim provisions are : (a) Interim Measures for hearing of administrative penalty in market supervision and Administration; (b) Interim Provisions on Prohibiting Monopoly Agreements; (c) Interim Provisions on Prohibiting Abuse of Dominant Market Positions; (d) Interim Provisions on Law Enforcement Supervision; and (e) Interim Provisions on Administrative Penalty Procedures.
[144] Complaint shall be made in writing and provide relevant facts and evidence.

practice, authentic media reports which expose monopolistic conduct may draw attention from enforcing authorities and trigger an investigation.[145]

(ii) Investigative Stage

If the authority for enforcement of the Anti-Monopoly Law decides to initiate an investigation, the undertaking that has done suspected monopolistic conduct will be under investigation. During the investigative process, the enforcement authority is empowered to inspect premises[146] of the undertaking, take the statement, collect relevant documents and materials held by the undertaking or any other interested party, seal up relevant evidence, and demand the bank accounts information of the undertaking.[147]

(ii) Decision-Making Stage

According to Article 40 of the Anti-Monopoly Law, preceding investigative measures shall be done by at least two enforcement officers under the approval of the principal leading person of the authority. Enforcement officers shall record the inquiry and investigation in written form, signed by the party concerned. When conducting an investigation, enforcement officers are obliged to respect and protect the commercial secrets that they have accessed from disclosure.[148] Parties involved in an investigation are required to cooperate with the enforcement authority under Article 42 of the Anti-Monopoly Law. As a result, they shall not hinder the investigation; otherwise they may be penalized under the Anti-Monopoly Law. Indeed, the Anti-Monopoly Law not only obliges parties involved in an investigation but also affirms that they enjoy the right to make statements as a defense.[149]

If the investigation verified the suspected monopolistic conduct, the authority enforcement would conclude that it constitutes monopoly conduct that infringes the anti-monopoly rules and make decisions to deal with it. The enforcement authority may publish the decision or may not.[150] The enforcement authority may decide to suspend the investigation if the undertaking concerned commits to eliminate the consequences of its monopolistic conduct within a reasonable period and the said authority accepts the commitment.[151] The decision shall contain the details of the undertaking's commitment, but Article 45 Anti-Monopoly Law says no word about the publicity of the decision. When the undertaking fulfills its commitment, the enforcement authority shall close the investigation. Otherwise, the enforcement authority shall resume an anti-monopoly investigation if one of the conditions stated in Article 45(3) of Anti-Monopoly Law is satisfied.

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[145] SAIC initiated the antitrust investigation against one sports products company after China Central Television (the Chinese state-controlled broadcaster) reported the suspected monopolistic conducts of the company.

[146] Including business premises or relevant places.

[147] These measures are contained in Article 39 of the Anti-Monopoly Law.

[148] Article 41.

[149] Article 43.

[150] Article 44.

[151] Article 45(1).

## 3.4 Private Enforcement

Article 50 of the Anti-Monopoly Law indicates that any person who has suffered loss from monopolistic conduct is entitled to claim compensation before a competent court. Other than that, the Supreme Court also stresses that the AML shall secure the right to compensate damages resulting from anti-monopoly conducts. Therefore, any interested party can file an antitrust lawsuit with a court having jurisdiction on hearing it. The court shall ensure the right to take private litigation against anti-monopolistic conduct.

However, the use of private antitrust litigation was not as common as it was supposed to be in accordance with the statistics of private litigation published by the Supreme Court at the 10th Anniversary Symposium for enforcement of the Anti-Monopoly Law. The statistics indicate that till the end of 2017, only 700 cases were filed with courts and, 630 of them were concluded.[152] Furthermore, only 282 cases' judgments were made public.[153] Among these, 26 are disputes relating to monopoly agreements, and the rest are conflicts about the abuse of dominance. In accordance with an article, courts supported full of part claimants from plaintiffs only in 4 cases, claimants contained in 189 cases were dismissed by courts, 16 were refused to enter the litigation proceedings, and plaintiffs withdrew 31 cases.[154]

In 2018, the Supreme People's Court selected ten competition cases heard by courts on its website to share summarized information.[155] Among the ten cases, the paper will introduce two meaningful cases in the following section. The two cases raised attention and debate from the public because parties involved in are big firms and the amounts of damages claimed by plaintiffs are enormous. Another possible reason is that the two cases have been heard by the same court but the public welcomes one and criticizes the other. Under this situation, the paper believes that China shall do more to help victims claim compensation for damages suffered from anti-competitive conducts.[156]

### 3.4.1 Qihoo v. Tencent[157]

On November 15, 2011, Qihoo (Beijing Qihoo Technology Co., Ltd.) filed a lawsuit against Tencent (Tencent Technologies (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.) with the Guangdong High People's Court. Qihoo alleges that Tencent had abused its dominant position

[152] See Supreme Court website at http://www.court.gov.cn/zixun-xiangqing-130481.html, accessed May 12, 2021.
[153] Article 4 states that court shall not publish judgments on the internet if they think it is not appropriate to do so.
[154] See the Chinese article authored by 杜爱武，陈云开 2008-2018 中国反垄断民事诉讼案件数据。竞争法律与政策评论 2019 年 00 期，上海交通大学竞争法律与政策研究中心;上海市法学会竞争法研究会。
[155] Details are available at http://www.court.gov.cn/zixun-xiangqing-130571.html, accessed May 15, 2021.
[156] This point will be discussed in next chapter.
[157] Full text of judgment is published on the website of Suoreme People's Court: http://www.court.gov.cn/paper/content/view/id/7973.html, accessed May 16, 2021.

in the Chinese instant messaging software and services market, compelled its users to remove Qihoo from their computers to continue using Tencent application. As a result, the competition had been eliminated and restricted. On March 20, 2013, Guangdong Higher People's Court held that Tencent did not hold a dominant position in the relevant market and dismissed Qihoo's claims. Qihoo appealed to the Supreme Court, but the Supreme Court rejected Qihoo's appeal and upheld the first-instance court judgment made by the Guangdong Higher People's Court dated October 16, 2014.

Qihoo v. Tencent, as the first private anti-monopoly case in relation to abuse of dominance heard by the Supreme Court, has triggered a heated public discussion and incurred a lot of criticism. Till now, scholars and lawyers are calling for re-investigating the case. This is because they believe the first-instance court has made severe mistakes in fact-finding, and the jurisdiction objection claimed by the plaintiff, Qihoo, was not dealt with properly.

### 3.4.2 Huawei v. IDC[158]

Turning towards the case Huawei v. IDC, the plaintiff Huawei (Huawei Technologies Co., Ltd.) filed a lawsuit with the Shenzhen Intermediate People's Court against the defendant IDC (InterDigital) on December 6, 2011. Huawei requested the court to order IDC to cease abuse of its dominant position relating to the SEPs[159] for 3G[160] and compensate Huawei with RMB20 million in damages. On the same day, Huawei filed another lawsuit against IDC, requesting the court to judge and decide the royalty rates of IDC's Chinese SEPs[161] based on the FRAND[162] terms. At the time, Huawei was a major supplier of telecommunication equipment in China; IDC was a major holder of essential patents and patent applications under 2G, 3G, and 4G standards in wireless communications in China. Especially, IDC admitted that it held SEPs in all of China's wireless communication standards[163].

Since November 2008, Huawei has held several negotiations with the IDC concerning licence royalties for certain relevant patents. However, regardless of the plaintiff's needs, IDC demanded that royalties be paid for all of the patents, not just the SEPs for 2G, 3G, and 4G, only those listed in Huawei's offers. Huawei claims that the amounts of royalties that the IDC demanded from Huawei were much higher than those offered to other companies, such as Apple and Samsung. Furthermore, IDC also requires that Huawei provide free licensing of all its patents to IDC. Hence, Huawei believed that the defendant's conduct had abused its dominant market position and constituted a monopoly. The court stated that IDC breached the

[158] Full text of judgment is published on the website of Guangdong High People's Court: https://www.mlex.com/China/Attachments/2014-04-18_AXRC879FW8P38IO7/guangdonghpc_IDChuawei_SEP_18042014.pdf, accessed May 18, 2021.
[159] Acronym of Standard Essential Patents.
[160] 3G represents the third generation of mobile networks where G stands for 'Generation' and the number 3 represents the generation number.
[161] Including SEPs of 2G, 3G and 4G.
[162] FRAND stands for fair, reasonable, and non-discriminatory.
[163] Including WCDMA, CDMA2000, TDSCDMA standards.

FRAND principle by overpricing and bundling unnecessary patents to Huawei. The court ordered IDC to stop the monopolistic conduct of overpricing and tying sales and awarded damages of RMB20 million to Huawei.

Both parties appealed to the Guangdong High People's Court, but the appellate court rejected the appeals and upheld the first-instance judgment. The public welcomes this judgment and recognizes the courts' endeavor.

# 4 COMPARISON AND ANALYSIS

In this chapter, this paper will draw a comparison between the EU and China regarding enforcement of competition law to demonstrate that China can learn from the EU in three aspects: (a) the problem of publicity and transparency in the application of its anti-monopoly law; (b) the less use of judicial review; and (c) the protection of victims' right to claim compensation.

## 4.1 Publicity and Transparency

The problem of publicity and transparency in the application of laws has long been criticized within China. Hence, China commenced improving publicity and transparency in administration and judicial practice, such as establishing specialized platforms to help citizens access government affairs and courts' judgments and rulings. Further, China has revised relevant laws to ensure peoples' claimants are heard when involved in disputes with the government.

However, the problem of publicity and transparency in anti-monopoly law enforcement is still waiting to be appropriately handled. One important reason for this difficulty is the lack of a legal basis. Article 44 of the Anti-Monopoly Law permits the enforcement authorities to decide to make publication of its decisions or not once the anti-monopolistic conduct has been verified. On the contrary, the EU enjoys a good reputation for increasing transparency when enforcing EU laws. For example, the EU Charter of Fundamental Rights[164] confirms and protects 'every person's right to good administration. These rights include the right to be heard before any individual measure which would affect his or her adversely is taken, the right to have access to his or her file while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions.[165] Specifically, other than Article 41 CFR and provisions of Regulation 1049/2001 regarding public access to European Parliament, documents that ensure every person's rights under the fundamental right to good administration, rules made by the Council and Commission to implement the EU competition law also highly values these rights and

[164] Hereinafter referred to as CFR.
[165] Article 41 CFR.

transparency. For instance, the recitals and provisions of Regulation 1/2003 and its predecessor Regulation 17/1962 and Regulation 773/2004 indicate that the EU respects every person's rights listed in Article 41 CFR in enforcing competition law.[166]

In this section, this paper will focus on EU cases to find how the EU handles the problem of publicity and transparency during the application of competition law, to see what can China learn from the EU, and to suggest how to be more transparent in the application of China' Anti-Monopoly Law.

As stated in chapters 2 and 3, it is clear that both the EU and China have set up a series of rules to implement the application of competition law by public authorities. These rules regulate the whole process of enforcing competition law from initiating the anti-competitive investigation to the end of the case. The complete procedure for antitrust enforcement can be divided into four stages: (a) initiation of the investigation, (b) investigative stage, (c) decision-making stage, and (d) judicial review. Therefore, to understand how an anti-competitive infringement was investigated and brought to an end transparently, the paper will refer to the Commission's Google Search (Shopping),[167] Google Android,[168] and Google Search (AdSense)[169] decisions. Issues relating to judicial review will be discussed in the next section.

By searching the three Google cases, two points can be observed directly. The one is that the whole process is organized in a form in which documents of every stage are released orderly. The other is that every document contained in the fore form is available for reading and downloading, i.e., the Commission executes its power to enforce competition law under Article 41 CFR and rules contained in relevant Regulations. The two points can be verified by access to websites attached in relevant footnotes. Further, the full text of the three decisions is very comprehensive and exhaustive.

By contrast, antitrust decisions made by China's competition authorities are, firstly, not as exhaustive as antitrust decisions made by the EU Commission. Secondly, not all decisions are made public. Thirdly, once made public,

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[166] Recital 32, Articles 27 and 30 of Regulation 1/2003; Recital 11, Articles 19-21 of Regulation 17/1962; Recital 2, Articles 2, 14-16 of Regulation 773/2004.
[167] AT.39740, Google Search (Shopping) Decision of 27 June 2017, full text is available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, accessed May 16, 2021. Information about whole process is available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740, accessed May 16, 2021..
[168] AT.40099, Google Android Decision of 18 June 2018, full text is available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, accessed May 16, 2021. Information about whole process is available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099, accessed May 16, 2021.
[169] AT.40411, Google Search (AdSense) Decision of 20 March 2019, full text is available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_10.pdf, accessed May 16, 2021. Information about whole process is available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411, accessed May 16, 2021.

certain information (even though it does not fall within the scope of professional/business secrecy) may be concealed. Reference will be made to two decisions made by the NDRC and two decisions made by the SAMR and AMR (Jiangsu)[170] separately.

Two decisions were made by NDRC on Taiping General Insurance Co., Ltd. Zhejiang Branch (Taiping Zhejiang)[171] and the decision on Medtronic (Shanghai)[172] separately. The AMR (Jiangsu) decision is made on Yancheng ENN Gas Co., Ltd.[173], and the SAMR decision is made on Alibaba Group. After analyzing the full text of the four decisions, two common features can be observed. The full text of decisions is simplified and mainly introduced the facts and demonstrated why the conduct constituted monopolistic conduct and infringed the Anti-Monopoly Law. The other is that decisions do not contain the information of the investigative stage or summarized the process of the investigative stage very simply. Pertaining to the second point that not all decisions may be made public because the Anti-Monopoly Law allows authorities for its enforcement to publish its decision selectively. With regards to the third point, certain information may be concealed even though a decision is issued, and the paper will refer to one decision made by the AMR (Nanchang). This decision is difficult to understand because it is made public without mentioning any information concerning investigation, facts, which provision(s) of the Anti-Monopoly Law was infringed, defence of the addressee, fines etc., but the name and the ID number of the addressee.

In conclusion, the EU Commission does well in dealing with publicity and transparency when enforcing EU competition law. At the same time, the public enforcement of China's Anti-Monopoly Law indeed lacks transparency, especially in making public anti-monopoly decisions. The paper suggests China increasing the publicity and transparency in the enforcement of the Anti-Monopoly Law by improving the draft of antitrust decisions and publishing details of cases as exhaustive as possible, for example, AMRs shall pay more attention to adding procedural information, including (i) details in relation to investigative procedures,[174] and (ii) how addressees defense themselves and exercise their procedural rights[175] during the investigative stage, into anti-monopoly decisions.

## 4.2 Judicial Review

Judicial review is a mechanism to test the legality of actions of the legislative, executive, and administrative arms of government and

[170] Jiangsu is the province where the AMR rooted in.
[171] Published on NDRC's website: http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624528.html, accessed May 15, 2021.
[172] Published on NDRC's website at http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201612/t20161209_829717.html, accessed May 15, 2021.
[173] Published on SAMR's website at http://www.samr.gov.cn/fldj/tzgg/xzcf/202007/t20200724_320227.html, accessed May 15, 2021.
[174] Details relating to when and how every procedural stage is carried out.
[175] For example, the right to apply for an oral hearing.

determine whether such actions are consistent with the written constitution or unwritten constitutional rules. In the EU, Article 263 TFEU[176] empowers [T]he Court of Justice to review the legality of legislative acts, acts of the council, the Commission, and the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and the European Commission intended to produce legal effects vis-à-vis third parties. In addition, the Court of Justice also held that European Union is based on the rule of law in Les Verts v European Parliament.[177] As a corollary, EU institutions are subject to judicial review of their actions. Concerning the development of judicial review in the application of EU competition law, history can date back to the age of Regulation 17/1962, which empowers the Court of Justice to review the Commission's decisions on fixing a fine or periodic penalty payment with full jurisdiction.[178] As a result, the Court of Justice may cancel, reduce or increase the fine or periodic penalty payment.

Since this paper's subject focused on the enforcement of competition rules, this section will compare the practice of judicial review of an anti-competitive decision made by competition authorities in the EU and China to find what China can learn from the EU.

Searching cases in relation to enforcement of EU competition law, there is a large number available for reference. The critical disputes of those cases may involve (a) the prioritization of enforcement, (b) the Commission's power to inspect, (c) obstruction during the inspection, (d) request for information, (e) Statement of Objections and access to file, (f) professional secrecy, (g) right against self-incrimination, (h) professional legal privilege, (i) interim measures, (j) finding and termination of infringement - remedies, (k) commitments, (l) fines, (m) liability of a parent company to a fine, (n) recovery of fine from employees and directors, (o) limitation periods, (p) full and effective judicial review, (q) leniency program, (r) access to the Commission's internal documents and evidence, (s) settlement procedure in cartel cases, and (t) the decision power of national competition authority.[179] Cases that fall within the scope of fore categories are heard by the EU courts.

Among the abundant fore categories, the paper will select one case in a close connection with the theme of this section, the judicial review. Therefore, reference will be made to KME Germany and others (KME) v Commission.[180]

In the case, KME appealed the judgment of the General Court in KME Germany and others v Commission[181]. Background is as follows: KME and other producers of semi-finished products in cooper and cooper alloys, the

[176] Ex Article 230 EC.
[177] Case 294/83 Les Verts v European Parliament, EU:C:1986:166, para. 23.
[178] Article 17. Article 31 of Regulation 1/2003 succeeded it.
[179] This category refers to the classification in Ariel Ezrachi, EU Competition Law: An Analytical Guide to the Leading Cases (Six Edition), 2018, Hart Publishing, chapter 10.
[180] Case C-272/09 P KME Germany AG v Commission EU:C:2011:810.
[181] Case T-127/04 KME Germany and others v Commission EU:T:2009:142.

Outokumpu Group, signed a set of anti-competitive agreements fixing prices and share markets in the industrial tubes sector. After inspections and investigations, the Commission made the decision at issue on December 16, 2003. In the decision, the Commission held that the concerted practice of price-fixing and market sharing constituted a severe infringement by its nature.[182] Hence, the Commission fined Outokumpu Group and KME after assessing the seriousness and actual effects of the infringement.[183] In addition, the Commission reduced the amount of the fines in accordance with Leniency Notice.[184] Outokumpu Group accepted the decision, while KME appealed the decision before the General Court for reduction of fine or annulment of the decision. Due to the General Court dismissed KME's action and ordered KME to pay the cost, KME appealed the first-instance judgment before the Court of Justice.

In the judgment, the Court of Justice upheld the judgment of the first instance and upheld the compatibility of the standard of judicial review of the Commission's decision which imposes fines or periodic penalty payments for infringements of EU competition law by confirming the requirement for a full review in competition cases.[185] Namely, EU courts have the power annul the contested decision and to alter the amount of the fine.

Likewise, China recognized the importance of judicial review, but the judicial review mechanism is underway. According to Administrative Litigation Law, every natural or legal person or any other organization has the right to bring a lawsuit before a court provided that his/her/its lawful rights and interests have been infringed by a specific administrative act of an administrative organ or its staff.[186] Nonetheless, the jurisdiction of a court on hearing an administrative litigation is a limited jurisdiction on specific administrative conduct, i.e. the court can not review whether the instrument, the basis for the specific administrative conduct, is compatible with China's constitution.[187] The limited jurisdiction of judicial review has led to a lot of criticism and prompted the revision of Administrative Litigation Procedure Law in 2014. The revised version allows the court to review certain instruments based on which a specific administrative conduct was made. Still, the jurisdiction is limited to reviewing administrative rules promulgated by departments under the State Council or local governments.[188]

Considering the fact that present anti-monopoly rules implementing the Anti-Monopoly Law are promulgated by the SAMR or the Anti-Monopoly Commission under the State Council, the court's limited jurisdiction on

[182] Recital 294 of the decision at issue.
[183] Recitals 314-316 of the decision at issue.
[184] Recitals 402, 408 and 423 of the decision at issue.
[185] Paras 106-9 of the judgment.
[186] See Articles 2 of the former Administrative Litigation Procedure Law.
[187] See Article 5 of the former Administrative Litigation Procedure Law.
[188] Article 13(2). The interpretation of Article 13(2) is available at http://rmfyb.chinacourt.org/paper/html/2015-04/28/content_97184.htm?div=-1, accessed May 17, 2021.

hearing anti-monopoly cases may not impede the use of judicial review by an undertaking. However, the reality is that only a few undertakings filed a lawsuit against the decision made by anti-monopoly authorities after the Anti-Monopoly Law entered into force. The author searched judgments of relevant cases on China Judgment Online with key words 'anti-monopoly dispute and administrative case' but no result was found. Then the author searched online found that only two law firms (one is the Dentons, the other is Hui Ye) introduced cases in relation to administrative litigation against the anti-monopoly decision on their websites.[189] The Dentons listed 5 cases occurring from 2014 to 2018, and the Hui Ye listed 10 cases (2 cases were also contained on the Dentons' website) arising from 2014 to April 2021. Thanks to the information provided by the two firms, the author searched the China Judgment Online via the case name listed on the two websites and found six judgment records (two judgments are not accessible) among 13 cases.

Concerning less use of judicial review, the paper believes that one potential reason is that addressees have no confidence to win. As the Dentons introduced on its website, none of the 5 cases' requirements was supported by the court. Another potential reason is that addressees chose to apply for administrative reconsideration of the anti-monopoly administrative decisions pursuant to Article 53 of the AML allows. The third possible reason is that addressees neither applied for an administrative reconsideration nor filed an administrative lawsuit against the anti-monopoly authority which made the decision. However, all of the three reasons are assumptions based on limited sources.

To conclude, the paper has two suggestions. First, the Supreme Court shall draft and promulgate judicial interpretation regarding anti-monopoly administrative litigation; second, courts shall pay attention to making judgments in relation to anti-monopoly administrative litigation public.

## 4.3 Support for Victims

Since the topics of the fore two sections fall within the scope of public enforcement of competition law, this section will concentrate on issues that fall within the scope of private enforcement. Following the presentation of private enforcement of the EU and China made in chapters two and three, respectively, this section will analyze how the EU and China deal with private actions.

In the EU, private actions are heard by national courts. Those cases may involve in (a) direct effect of Articles 101 and 102 TFEU, (b) actions for damages, (c) measure of damages, (d) Euro defense, (e) interim relief, (f) early disposal of competition claims, (g) burden and standard of proof in competition cases, (h) standing and passing-on defense, (i) uniform

[189] Article published by Dentons (Shanghai) is available at https://www.sohu.com/a/287280385_806432 and the article published by Hui Ye Law Firm is available at http://www.huiyelaw.com/news-2244.html, accessed May 17, 2021.

application of competition laws, (j) Commission commitment decisions and the national court, (k) cooperation between national courts and Commission, and (l) jurisdiction and applicable law.[190]

The EU has promulgated the Damages Directive to help citizens and companies claim compensation when they suffer damages resulting from infringements of EU antitrust rules. Before the adoption of Damages Directive, it is also possible to take private actions to claim compensation. Therefore, this section will refer to cases of damages to observe how the EU helps natural or legal persons receive compensation and to find what experience is suitable for China to consult.

Pertaining to private actions for compensation, the fundamental precondition, legal basis, shall be taken into consideration. Although the Treaty, which contains common competition rules, does not provide the legal foundation for victims to claim damages suffered from infringements of EU competition law, the EU court recognized the direct effect of Articles 101 and 102 TFEU. As a corollary, the EU court further confirmed victims' right to Damages in subsequent cases. The Court in BRT v SABAM[191] held that Articles 101 and 102 TFEU are directly enforceable between individuals and repeated in Guérin automobiles v Commission[192], ruling that 'any undertaking which considers that it has suffered damages as s result of restrictive practices may rely before the national courts ... on the rights conferred on it by Article 101(1) and Article 102 TFEU.' The Court of Justice reaffirmed that Article 102 TFEU has direct effect and Member States shall safeguard rights derive from it in GT-Link A/S v De Danske Statsbaner[193] and in Courage Ltd v Bernard Crehan[194], the court also held that 'any individual can rely on a breach of Article 101(1) TFEU before a national court.' Furthermore, the Court of Justice extends the right in damages to third parties if they are adversely affected by a prohibited anti-competitive agreement and commented on the availability of punitive damages in competition cases in joined Vincenzo Manfredi v Lloyd Adriatico Assicurazioni.[195]

As for private enforcement of competition law in China, while the EU confirms victims' right to damages in judgments made by EU courts, China directly confers victims the right to claim for damages before the court in Article 50 of the Anti-Monopoly Law. Other than the provision for civil liability regulated in the Anti-Monopoly Law, the Supreme People's Court issued its judicial interpretation to guide the trial of disputes resulting from monopolistic conduct in 2012. The judicial interpretation repeats that any natural or legal person or other organization is entitled to file a lawsuit with

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[190] This category refers to the classification in Ariel Ezrachi, EU Competition Law: An Analytical Guide to the Leading Cases (Six Edition), 2018, Hart Publishing, chapter 11.
[191] Case 127/73 BRT v SABAM EU:C:1974:6, para. 16.
[192] Case 282/95 P Guérin automobiles v Commission EU:C:1997:159, para. 39.
[193] Case 242/95 GT-Link A/S v De Danske Statsbaner EU:C:1997:376, para. 27.
[194] Case 453/99 Courage Ltd v Bernard Crehan EU:C:2001:465, para. 24.
[195] Case 295/298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni EU:C:2006:461, paras 92, 99-100.

the court on the condition that he/she/it has suffered loss from monopolistic conduct, specifies which court has jurisdiction, and formulates details for the conduct of the trial. Article 14(1) states that the court may order the defendant to cease monopolistic conduct and compensate the plaintiff's actual losses arising from the conduct at issue. Article 14(2) states that the court may even order the defendant to offset the plaintiff's reasonable costs on investigating and preventing the defendant's monopolistic conduct. In 2020, the Supreme People's Court revised the interpretation regarding the modification of judicial interpretation in hearing infringements of IP cases.[196] However, mere changes were made in relation to the competent courts and limitation periods.

In 2018, to celebrate the 10th anniversary of the enactment of the Anti-Monopoly Law, the Supreme People's Court issued an article[197] to recall the practical development of private enforcement in the past decade and shared the summary of 10 meaningful cases on its website.[198] The article contains a table to reflect the change in the annual number of lawsuits filed with courts and concluded by courts from 2008 to 2017. In accordance with the information contained in the table, it can be found that: (a) the total number of lawsuits filed with courts is 700 and 90 per cent of them were brought to an end, and (b) the annual number of lawsuits filed with courts and concluded by courts increased rapidly till 2016 and then experienced a downward trend from 2016 to 2017.

In the article, the Supreme People's Court suggested that it is difficult for plaintiffs to win under the present principle for the burden of proof. The claimant affords the duty to provide evidence while almost all relevant evidence is under the control of the defendant.[199]

Furthermore, the Supreme People's Court put forward pieces of advice to ease trial work. Firstly, China shall digest competition theories learned from other jurisdictions before applying them to its anti-monopoly practice. It shall deep its research on anti-monopoly practice, particularly in new industrial areas. Secondly, China shall strengthen its understanding of substantive antitrust rules and refine the analysis framework for part monopolistic conduct. Thirdly, China shall unify the application of substantive anti-monopoly rules, for example integrating the qualification of harm. Finally, China shall alleviate the plaintiff's burden of proof.

The paper agrees with the Supreme People's Court's advice and suggests China studying EU competition law theories and referring to some EU competition provisions for the purpose of easing its trial work. Since China

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[196] Information was available at http://www.court.gov.cn/fabu-xiangqing-282671.html, accessed May 17, 2021.
[197] The article is published by China Intellectual Property Paper on August 24, 2018, p8. Online resource is available at http://www.ipph.cn/news/mtbd/201809/U020180913422905101486.pdf, accessed May 17, 2021.
[198] See (n 155).
[199] In the Chinese article (see n 154), the author summarized the statistics of private anti-monopoly cases revealing that only 4 cases won by the plaintiff from the year 2008 to 2018. But the article did not explain the reason for the low winning rate.

has realized that its burden of proof imposed on claimants is quite strict and there is a need to alleviate it, the paper will recommend China to learn the EU's practice in regulating the qualification of harm.

Therefore, reference will be made to Article 17 of Damages Directive. Under Article 17, EU Member States shall ensure that, first, its burden or standard of proof required for qualification of harm is not practically impossible nor excessively difficult for claimants to exercise the right to damages, and national courts are entitled to estimate the amounts of harm suffered by a claimant under certain conditions; second, cartel infringements are presumed to cause harm; and third, national courts may request assistance from NCAs concerning the determination of the quantum of damages. In the circumstances, China may formulate a unified qualification of harm for competent courts to avoid difficulties in qualifying the harm caused by monopolistic conduct and prevent unnecessary disputes in determining compensation.

# 5 CONCLUSION

To conclude, after illustrating the development and practical experience of applying competition law in the EU and China, this paper observes that the EU performs well in establishing its competition system and ensuring the effective function of its competition law. Hence, this paper suggests that China could learn the EU's experience both in establishing a comprehensive competition system and in the application of competition rules. Specifically, China shall improve the level of publicity and transparency in regulating monopolistic conducts, impel the use of judicial review to supervise the anti-monopoly work done by competition authorities, and promote social cognition of monopolistic conducts to raise social, particularly victims' awareness or confidence on claiming compensation.

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