THE TENSION BETWEEN PUBLIC INTEREST LITIGATIONS AND PRIVATE ACTIONS UNDER CHINA'S ANTI-MONOPOLY LAW

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Abstract

China's Anti-Monopoly Law came into effect in 2008. Since then, the country has been relying on both conventional public enforcement and private enforcement to combat anti-competitive conduct. Then, in 2022, China amended its Anti-Monopoly Law for the first time. Among other things, the amendment extended the then-existing public interest litigation regime to the antitrust field. Thereafter, if antitrust victims want to seek compensation, they can either (1) file a private action and claim damages by themselves or (2) ask the procuratorate to initiate a public interest litigation and claim damages for them. The rise of the new form of antitrust enforcement provides an incentive for some victims to free-ride the procuratorate's effort, hindering the development of private antitrust enforcement in China. As a first attempt, this article examines the tension between the two forms of enforcement via cost-benefit analysis and proposes ways to mitigate its negative consequences.

Keywords: Anti-Monopoly Law of China; Public Interest Litigation; Private Enforcement; Free Riding; Public Interest

I. INTRODUCTION

Since China's Anti-Monopoly Law (AML) came into force in 2008, the nation has been permitting and relying on both public and private enforcement to combat anti-competitive conduct.[1] Public enforcement is currently carried out by the State Administration for Market Regulation (SAMR). The SAMR detects, investigates, and sanctions infringers of the AML, aiming to punish and prevent anti-competitive practices. Private enforcement refers to litigation initiated by individuals or firms who have suffered injury from anti-competitive conduct, against their injurers in courts, to seek damages and/or other injunctive relief. As in most jurisdictions, public enforcement plays a central part in antitrust enforcement in China.2

[1] Zhang Sulun (张素伦), Fan Longduan Minshi Susong Xiangguan Chengxu de Chongtu yu Xietiao (反垄断民事公益诉讼相关程序的冲突与协调) [Conflict and Coordination of Procedures Related to Anti-monopoly Civil Public Interest Litigation], 30 HENAN FAXUE (河南法学) [HENAN SOCIAL SCIENCES] 33, 33–34 (2022).

[2] Hu Zhiyu (胡旨钰), Fan Longduan Jiancha Minshi Gongyi Susong Zhidu de Tansuo yu Wanshan Lujing—Yi Xin "Fan Longduan Fa" Shishi Wei Qiji (反垄断检察民事公益诉讼制度的探索与完善路径—以新《反垄断法》实施为契机) [An Examination and Perfection of the Anti-Monopoly Procuratorial Public Interest Litigation—Take the Implementation of the New "Anti-Monopoly Law" as an Opportunity],

To diversify the enforcement mechanism and improve the efficiency of market regulation, a new form of public enforcement – public interest litigation (PIL) – was recently introduced through the amendment of AML.[3] In January 2020, the SAMR kickstarted the amendment process by publishing the first draft of amendments to the AML.[4] Upon deliberations and revisions, the draft was adopted by the National People's Congress on 24 June 2022 and came into force on 1 August 2022.[5] In the amendment, fourteen provisions were revised, and seventeen new sections or subsections were added.[6] These changes aimed to perfect the law and address the new challenges arising from antitrust practices in recent years.[7] For the purpose of this article, notably, a second paragraph was added to Article 60 of the AML, which states that '[*w*]*here undertakings engage in monopolistic practices and harm the public interest, the people's procuratorates at or above the level of districted cities may initiate civil public interest litigation in the people's courts in accordance with the law.*'[8] Such an addition empowered the people's procuratorates (hereinafter the procuratorate) to initiate legal proceedings against monopolistic behaviours that harm the public interest on behalf of the state, especially when the harm spreads across consumers or society as a whole.[9] Before this amendment was implemented, PILs were already available in China, but it was unclear if they

12 ZHONGGUO JIAGE JIANGUAN YU FAN LONGDUAN (中国价格监管与反垄断) [PRICE SUPERVISION AND ANTI-MONOPOLY IN CHINA] 37, 37–38 (2022).

[3] Wu Bo (吴波), Jianyi zai Fan Longduan Lingyu Yinru Jiancha Gongyi Susong (建议在反垄断领域引入检察公益诉讼) [Proposal to Introducce Procuratorial Public Interest Litigation in Anti-Monopoly Field], 13 RENMIN JIANCHA (人民检察) [PEOPLE'S PROCURATORIAL SEMIMONTHLY] 33, 34 (2020).

[4] Osborn Kathy et al., Amendments to China's Anti-Monopoly Law: What Has Changed and What to Expect, FAEGRE DRINKER (Jul. 6, 2022), https://www.faegredrinker.com/en/insights/publications/2022/7/amendments-to- chinas-anti-monopoly-law-what-has-changed-and-what-to-expect.

[5] Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 24, 2022, effective Aug.1, 2022) (Chinalawinfo) [hereinafter "AML"].

[6] Xinhua She (新华社), Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui guanyu Xiugai "Zhonghua Renmin Gonghe Guo Fan Longduan Fa" de Jueding (全国人民代表大会常务委员会关于修改《中华人民共和国反垄断法》的决定) [Decision of the NPCSC on the amendment of "Anti-Monopoly Law of China"], STATE COUNCIL OF THE PRC (Jun. 25, 2022), http://www.gov.cn/xinwen/2022-06/25/content_5697697.htm; See Arendse Huld, What Has Changed in China's Amended Anti-Monopoly Law?, CHINA BRIEFING (Jul. 11, 2022), https://www.china-briefing.com/news/what-has-changed-in-chinas-amended-anti-monopoly-law/ ; Cristina Zhang, The Amended Anti-Monopoly Law: Key Changes Under the Competition Policy, 15 TSINGHUA CHINA L. REV. 179 (2022) (more information about the amendment).

7 Suzhou Shi Tongji Ju (苏州市统计局), "Zhonghua Renmin Gonghe Guo Fan Longduan Fa (2022 Xiuding)" Jianyao Jiedu (《中华人民共和国反垄断法（2022修订）》简要解读) [A Brief Explanation of "Anti-Monopoly Law of China (2022 Revision)"], Bureau of Statistics of Suzhou (Nov. 15, 2022), https://tjj.suzhou.gov.cn/sztjj/flfg/ 202212/5b4f301d0209413888f630281b8689fd.shtml; See Dermot Cahill & Jing Wang, Addressing Legitimacy Concerns in Antitrust Private Litigation Involving China's State-Owned Enterprises, 45 World Competition 76, 88-89 (2022) (an example of the reforms).

8 AML, art. 60; See Peter Chan, Framing the Structure of the Court System in the Perspective of Case Management, 6 Peking Univ. L.J. 55 (2018) (more information about China's court system).

9 Hu, supra note 2, at 38.

were available for antitrust.[10] Thus, one could say that the new AML expanded the then-existing PIL regime to the antitrust field, at least in part.[11]

With the introduction of PIL as a new form of antitrust enforcement, it is worth examining its relationship with the existing public and private enforcement regimes. Concerning its relationship with public enforcement, some scholars suggest that SAMR enforcement and PILs serve a similar purpose but that the former is more effective. This is because SAMR adopts an administrative approach, while the procuratorates have to go through lengthy judicial processes. Thus, for example, Hu (2022) argues that priority should be given to the administrative approach such that procuratorates should only initiate PIL after administrative measures are exhausted.[12] In contrast, some scholars see antitrust PIL as a supplement to private enforcement. Shi (2022) argues that victims often lose in private antitrust actions due to the power imbalance between victims and large corporations, information asymmetry, and difficulties in collecting evidence.[13] Therefore, extending the use of PIL in antitrust cases is essential for strengthening claimants' litigation power.[14] Zhang (2022) explored the coordination between private actions and PILs. He suggests that, *inter alia*, when a competition violation gives rise to both a PIL and a private action around the same time, the ongoing PIL and private action should be combined and heard together by the same court. However, the court would issue separate judgements for the two cases, applying the principle of claim preclusion. Doing so could not only save judicial resources but also enhance the efficiency of adjudication.[15]

However, little attention has been given to the potential conflicts between PILs and private enforcement in China. The literature reveals that societies benefit from having more private antitrust enforcement.[16] For instance, (1) most competition violations are conducted secretly and are hard to detect. Private victims could then help unveil anti-competitive conduct because they have close information on these violations. (2) Despite private victims reporting violations to the antitrust authorities, the authorities may not act against the lawbreakers because of a lack of enforcement resources, sloth or corruption. (3) Even if the authorities take action and fine the lawbreakers, the victims are not compensated. Private actions can fill this gap by allowing victims to seek damages. (4) Private enforcement deters and desists violations. Recognizing the above benefits and beyond, countries worldwide have been promoting private

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[10] Infra Part 2.2.

[11] *Id.*

[12] Hu, supra note 2, at 39.

[13] Shi Jianzhong (时建中), Xin "Fan Longduan Fa" de Xianshi Yiyi yu Neirong Jiedu (新《反垄断法》的现实意义与内容解读) [The Practical Significance and the Content Interpretation of the New Anti-Monopoly Law], 4 Zhongguo Falü Pinglun (中国法律评论) [CHINA L. REV.] 182, 193 (2022).

[14] *Id.*

[15] Zhang, supra note 1.

[16] *See* ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 543 (5th ed. 2004); *See also* Robert H. Lande & Joshua P. Davis, Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases, 42 U.S.F. L. REV. 879, 905 (2008).

antitrust enforcement,[17] with China being no exception. This movement has received support and contributions from many scholars.[18] If the rise of PILs discourages private actions, China may suffer by failing to enjoy more benefits of private antitrust enforcement.

In light of the above, as a first attempt, this article examines the tension between PILs and private enforcement under the AML in China. To do so, this article first provides an overview of the development of PILs in China generally (Part 2.1) and their extension to the antitrust field specifically (Part 2.2). Then, this article demonstrates that the new PIL regime could give rise to a 'free-rider' problem (Part 3.1), which harms society in certain ways (Part 3.2). To address such a problem, this article proposes ways to alter the remedy structure to discourage free-riding (Part 4).

II. PUBLIC INTEREST LITIGATIONS

Some commentators suggest that the history of PILs can be traced back to ancient Rome, where citizens were authorized to file lawsuits on behalf of the social collective,19 while others suggest that the concept of PIL originated in the U.S. in the mid-1980s to uphold the public interest by providing legal representation to previously unrepresented groups.[20] In any event, over the last few decades, PILs have been developing gradually around the globe and have been used to, for example, challenge government actions, protect the environment, and promote the rights of marginalized groups. Internationally, while there is no universally accepted definition, PILs are commonly referred to as '[c]ases where there is a public benefit to be served through judicial resolution of issues presented, and in which there is a public interest in promoting access to justice.'[21] Moving forward, we will provide an overview

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[17] Sinchit Lai, Incentivizing Private Antitrust Enforcement to Promote Leniency Applications, 17 J. OF COMPETITION L. & ECON. 728, 730–731 (2021).

[18] *See, e.g.*, Liu Jiadi (刘佳頔), Lun Woguo Fan Longduan Fa Siren Zhixing Zhidu de Xianzhuang Ji Wanshan (论我国反垄断法私人执行制度的现状及完善) [Study on the Current Situation and Improvement of Private Enforcement of Anti-monopoly Law], 1 FAZHI YU JINGJI (法制与经济) [LEGAL & ECONOMY] 122, 122–123 (2018); Pei Yi (裴轶), Fan Longduan Fa de Siren Jiuji Zhidu Fenxi (反垄断法的私人救济制度分析) [An Analysis of the Private Remedy System of Anti-monopoly Law], 7 LANZHOU XUEKAN (兰州学刊) [LANZHOU ACAD. J.] 150, 157 (2017); Zhang Lihua (张理化), Fan Longduan Fa Siren Zhixing Zhidu de Goujian (反垄断法私人执行制度的构建) [Study on Constructing the Private Enforcement of Anti-monopoly Law], 47 Zhengzhou Daxue Xuebao (Zhexue Shehui Kexue Ban) (郑州大学学报(哲学社会科学版)) [J. OF ZHENGZHOU U. (PHIL. & SOC. SCI. ED.)] 72, 74–75 (2014).

[19] Yan Jingjing (闫晶晶), Gongyi Susong Jiancha: Ningju Gongshi, Dazao Shehui Zhili Gongtongti (公益诉讼检察：凝聚共识，打造社会治理共同体) [Procuratorate's Public Interest Litigation: Building Consensus, Creating a Community of Social Governance], Jiancha Ribao (检察日报) [Prosecutor's Daily] (2021), http://m.chinanews.com/wap/detail/zw/gn/2021/11-21/9613315.shtml.

[20] Ankushsaraf, Public Interest Litigation: Genesis and Evolution, Legal Service India, https://www.legalserviceindia.com/legal/article-542-public-interest-litigation-genesis-and-evolution.html.

[21] China Labour Bulletin Research Report, Public Interest Litigation in China: A New Force for Social Justice (Oct. 10, 2007), https://clb.org.hk/sites/default/files/archive/en/share/File/general/Overview_of_PIL_2.pdf.

of the development of PILs in China, both generally and within the field of antitrust.

A. Generally

The history of PIL in China can be traced back to 1996.[22] In January of that year, Mr. QIU Jiandong, a government official of Longyan City, sued the Post and Telecommunications Office of the same city for failing to implement a rule that requires public telephone booths to offer half-price discounts on long-distance calls at night. Since then, Mr. Qiu has often been referred to as the 'first person of public interest litigation in China'. Then, in 1997, a county procuratorate of Nanyang City handled a case relating to state-owned asset loss.[23] The county procuratorate filed a lawsuit in court against a town Administration for Industry and Commerce that sold state-owned assets at low prices. Following this case, procuratorates across China have brought some two hundred PILs.[24] However, because of a lack of legal basis, the procuratorates have once stopped bringing such litigations.

Then, China started to legislate on PILs. In 2012, China amended its Civil Procedure Law to include Article 55, which, for the first time, permitted authorities or relevant organizations as prescribed by the law to bring a civil action to the courts against actions that harmed the public interest, such as polluting the environment or infringing consumer rights.[25] Soon after, on the one hand, China amended its *Environmental Protection Law* and *Consumer Protection Law* to grant standing to qualified organizations to bring PILs.[26] On the other hand, China started to consider granting standing to the procuratorate to bring PILs. In October 2014, the Central Committee of the Chinese Communist Party adopted a decision to advance the rule of law, which includes considering allowing procuratorates to initiate PILs.[27] Then, in July 2015, China's National People's Congress Standing Committee (NPCSC) authorized a pilot scheme for the Supreme People's Procuratorate (SPP) to bring PILs in certain fields (e.g., environmental protection, consumer protection, food and drug safety, ecosystem and resource protection, state-owned land-use rights transfer, and state-owned assets protection) in thirteen provincial administrative

[22] *See*, *id.*; *See also* Xu hao (许浩), Wo Bushi Diaomin – Duihua Zhongguo "Gongyi Susong Diyiren" Qiu Jiandong ("我不是刁民"—对话中国"公益诉讼第一人"丘建东) ["I am not Troublemaker'' —A Conversation with Jiandong Qiu, the "first man in Public Interest Litigation" in China], Zhongguo Jingji Zhoukan (中国经济周刊) [CHINA ECONOMY WEEKLY], Jul. 9, 2007, http://finance.ce.cn/insurance/scroll-news/200707/09/t20070709_12099056_3.shtml.

[23] Yan, *supra* note 19.

[24] *Id.*

[25] Su Lin Han, Public Interest Litigation in China (2017), available at https://law.yale.edu/sites/default/files/area/center/china/document/public_interest_litigation_china_background_memo.pdf.

[26] *Id.*

[27] Yan, *supra* note 19.

regions for a period of two years.[28] The procuratorates were very supportive of the pilot program, filing 42 PILs in courts as of September 2016.[29]

As seen, there are two major types of PILs – (1) those filed by social organizations and (2) those filed by procuratorates. When China amended its Civil Procedure Law again in 2017, it institutionalized the latter type by expanding Article 55 as follows:

For conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court.

Where the people's procuratorate finds in the performance of functions any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers' lawful rights and interests in the field of food and drug safety, or any other conduct that damages social interest, it may file a lawsuit with the people's court if there is no authority or organization prescribed in the preceding paragraph or the authority or organization prescribed in the preceding paragraph does not file a lawsuit. If the authority or organization prescribed in the preceding paragraph files a lawsuit, the people's procuratorate may support the filing of a lawsuit.[30]

The Civil Procedure Law was further amended in 2021, and the above provision has been renumbered Article 58, with the content remaining unchanged.[31]

While both of these types are PILs, the nature of PILs brought by the Procuratorate is fundamentally different from that of PILs brought by social organizations (e.g., Consumer Associations). The Procuratorate is part of the judiciary and is funded by public resources. It derives the right of claim from its position as the supervisory authority, as set out in Article 134 of the Constitution.[32] This means that it is a public law right of claim. In contrast, nongovernmental social organizations act in the interest of specific citizen groups. The majority of such organizations are sponsored by the government, but the right of claim is private, emphasizing the connection between the plaintiff and the victim.[33] For example, the China Consumer Association is allowed to bring consumer protection PILs.[34]

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[28] Han, *supra* note 25, at 7; *See also* Changhao Wei, One Year on: Reform Pilots on Procuratorates Initiating Public Interest Litigation, NPC Observer (Nov. 8, 2016), https://npcobserver.com/2016/11/08/one-year-on-reform-pilots-on-procuratorates-initiating-public-interest-litigation/.

[29] *See* Wei, *supra* note 28.

[30] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 55 (2017) (Chinalawinfo) [hereinafter "Civil Procedure Law"].

[31] Civil Procedure Law, art. 58 (2021) (Chinalawinfo).

[32] XIANFA art. 134, (2018) (China).

[33] Han, supra note 25, at 5.

[34] Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on the Protection of Consumer Rights and Interests] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) (2013), art. 37, 47 (Chinalawinfo).

PIL is a form of representative litigation, but there is an important distinction between PILs and other representative litigations. China's Civil Procedures Law recognizes joint and representative actions, in which plaintiffs who suffered the same or similar harm can combine their claims into one single suit.[35] However, these actions are expressly discouraged by the Supreme People's Court in consideration of social stability and are therefore not commonly utilized.[36] Plaintiffs in a class action must be victims, while there is no requirement that public interest litigants (e.g., social organizations or procuratorates) have suffered harm. In other words, to initiate PIL, the public interest litigant's right or interest does not have to be infringed upon.[37]

Since the establishment of the PIL regime, PILs have been utilized extensively. While there is no statistic for PILs brought by social organizations, the procuratorate has published information about its PILs. From July 2017 to June 2022, the procuratorate opened files for approximately 672 thousand cases, of which 614 thousand were administrative PILs (91%) and 58 thousand were civil PILs (9%).[38] Nevertheless, not all of these cases were eventually brought to the courts. In a separate document, the procuratorate revealed that between July 2017 and June 2021 (i.e., one year shorter than the above period), it filed 19.7 thousand cases to courts, of which 2.3 thousand were administrative PILs (12%) and 17.3 thousand were civil PILs (88%).[39] Among the PILs brought to court, 72% were environmental protection cases, 21% were food and drug safety cases, 3% were state-owned land-use rights transfer cases, less than 1% were heroes and martyrs protection cases, and 3% were uncategorized.[40] There are two important takeaways from these statistics. First, while the procuratorate prioritizes initiating civil PILs in court, it can only escalate a very small percentage of cases from the investigation stage. Although we do not have information about cases that were resolved in the prelitigation stage, the figures suggest that the procuratorate does not have enough enforcement resources to prosecute all cases and hence has to give priority to certain types of cases. Second, the procuratorate has not initiated any antitrust PILs.

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[35] Han, *supra* note 25, at 1.

[36] *Id.*

[37] Wang Taigao & Tang Zhang (王太高 & 唐张), Lun Jiancha Jiguan Tiqi Gongyi Susong de Tixi Zhankai (论检察机关提起公益诉讼的体系展开) [On the Institutional Position of Procuratorial Public Interest Litigation], 1 SUZHOUDAXUE XUEBAO (FAXUE BAN) (苏州大学学报(法学版)) [J. OF SOOCHOW U. (L. ED.)] 1, 8 (2023).

[38] Zuigaojian Fabu Jianchajiguan Quanmian Kaizhan Gonhyisusong Wuzhounian Gongzuoqingkuang (最高检发布检察机关全面开展公益诉讼五周年工作情况) [The SPP Announced Working Progress of Implementing Public Interest Litigation for Five Years], SPP NEWS PUBLICATION (Jun. 30, 2022), https://www.spp.gov.cn/spp/xwfbh/wsfbt/202206/t20220630_561637.shtml#1.

[39] Zuigaojian Fabu Jiancha Gongyi Susong Qisu Dianxing Anli (最高检发布检察公益诉讼起诉典型案例) [The SPP announced Typical Cases of Procuratorate's Public Interest Litigation] SPP NEWS PUBLICATION (Sep. 15, 2021), https://www.spp.gov.cn/xwfbh/wsfbt/202109/t20210915_529543.shtml#1; Administrative PILs refer to PILs brought against administrative monopolies. Administrative monopolies exist when administrative bodies or other public organizations authorised by laws abuse their administrative power to restrict competition. Shuping Lyu et al., China's Fair Competition Review System: A Single Case Study, 45 WORLD COMPETITION 123, 128 (2022).

[40] *Id.*

As aforementioned, there are no comprehensive statistics for PILs brought by social organizations. That being said, in 2018, a database associated with Peking University identified thirty-six PILs and found that 61% of the PILs were initiated by the procuratorate, 31% were initiated by social organizations, 5% were brought by government departments, and 3% were brought jointly by social organizations and government departments.[41] This shows that the procuratorate plays a leading role in PILs. Notably, none of the PILs brought by social organizations were related to antitrust. This is unsurprising because the government has never amended the AML to grant standing to any social organization to initiate PILs.

B. In the Antitrust Field

The Civil Procedure Law set out that authorized social organizations and prosecutors could initiate a PIL against "conduct that […] damages the [social or] public interest"[42]. However, before the amendment of the Anti-Monopoly Law in 2022, it was unclear if PILs were available for competition law cases for years. This is because, first, the Civil Procedure Law enumerated a few areas of the law in which PILs are available but did not explicitly include competition law.[43] Second, the government amended the environmental law and consumer protection laws to grant standing to relevant organizations to bring PILs, but it did not do the same for the AML. Third, to the best of our knowledge, there has been no antitrust PIL recorded in China. In 2019, the procuratorate published twenty-six typical precedents to guide future prosecutions, but none of them are related to antitrust.[44]

Then, the first amendment to the AML was made in 2022. As aforementioned, a second paragraph was added to Article 60 of the AML to extend the PIL regime to the antitrust field.[45] However, the amendment did not grant standing to any social organizations to initiate antitrust PILs. Thus, as of today, only the procuratorate can initiate antitrust PILs. This article, therefore, only focuses on analysing the PILs brought by the procuratorate. Since Article 60 does not provide details about the antitrust PIL regime, to give context to this new form of antitrust enforcement, it is worth discussing three of its elements: (1) procuratorates as the entity to initiate such actions, (2) the meaning of public interest in the context of antitrust and (3) the procedures and remedies of such actions.

[41] Sanshiliu Li Gongyi Susong Shou'an Anli Shuju Fenxi Baogao (三十六例公益诉讼首案案例数据分析报告) [Data Analysis Report on 36 First-Brought Public Interest Litigation Cases], CHINALAWINFO (Jul. 18, 2018), http://weekly.pkulaw.cn/Admin/Content/Static/a8de4cb9-00dd-47fd-b418-5cff8f0d7e2b.html.

[42] Civil Procedure Law, art. 55 (2017).

[43] *Id.*

[44] Zuigao Renmin Jianchayuan Fabu 26 Jian Gongyisusong Dianxing Anli (最高人民检察院发布26件公益诉讼典型案例) [The SPP Announced 26 Typical Cases on Public Interest Litigation], CHINALAWINFO (Oct. 10, 2019), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=336381.

[45] AML, art. 60.

First, concerning the procuratorate as the entity to initiate PILs. The procuratorate is a sizable and multileveled organization in China.[46] At the top, there is the Supreme People's Procuratorate. Beneath it, there are the local level people's prosecutorial organs that comprise the prosecutorial organs at the provincial, municipal, and district or county levels. In addition, there are the special people's prosecutorial organs that comprise the military and railroad transportation prosecutorial organs. Under the Chinese Constitution, the procuratorate is positioned as the supervisory authority in law enforcement,[47] with the primary duty of protecting the public interest and the interest of the state. It is also responsible for the investigation and prosecution of crime.

In the context of antitrust, through PILs, the procuratorate performs its duties to (1) supervise the SAMR and (2) protect consumers' interests.[48] For the first duty, the procuratorate serves a supervisory role. In China, the SAMR is responsible for carrying out public antitrust enforcement. However, as in any other jurisdiction, public enforcement might be lax due to sloth or corruption.[49] For instance, Hu (2022) observed that large corporations with significant economic power are often, in some way, linked to local governments.[50] This potentially hinders effective investigation by local antitrust authorities.[51] In the worst-case scenario, the SAMR might not pursue relevant cases due to pressure from local governments or because it wants to 'keep its hands clean'. When public antitrust enforcement fails in this or other ways, the procuratorate, as a supervisory body, is more likely to withstand political pressure and initiate PIL to fill the gap and safeguard the public interest.[52]

For the second duty, the procuratorate serves a role in protecting consumers' interests. In addition to public enforcement, the AML can be enforced privately by victims (i.e., consumers being harmed). If successful, either type of enforcement could safeguard the public interest. However, similar to the failure of public enforcement, private antitrust enforcement is also not guaranteed. This is because antitrust violations are often conducted secretly, and victims might not know that they have been harmed by an antitrust violation. Moreover, even if victims detected the violation, they might give up suing the lawbreakers because they find it to be too costly.[53] Even worse, there is often an imbalance between the power of the victims and that of the lawbreakers. Victims of antitrust cases are often either less resourceful consumers or small companies, while lawbreakers are likely large corporations

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[46] Chunyan Ding & Huina Xiao, A Paper Tiger? Prosecutorial Regulators in China's Civil Environmental Public Interest Litigations, 32 FORDHAM ENV'T. L. REV. 323, 330–33 (2021).

[47] XIANFA art. 134, (2018) (China).

[48] Infra Part 2.2.

[49] Gellhorn, *supra* note 16, at 543.

[50] Hu, *supra* note 2, at 38.

[51] *Id.*

[52] Song Qingge (宋庆阁), Lun Fan Longduan Gongyi Susong Zhidu de Wanshan (论反垄断公益诉讼制度的完善) [On the Improvement of Anti-monopoly Public Interest Litigation], 32 XIANDAI SHANGMAO GONGYE (现代商贸工业) [MODERN BUSINESS TRADE INDUSTRY] 151, 152 (2019).

[53] Sinchit Lai, Enabling and Incentivizing Standalone Private Antitrust Actions in Hong Kong—Lessons from the United States, 16 BERKELEY BUS. L.J. 463, 507–509 (2019).

with substantial market power and adequate resources. The imbalance of power, coupled with information asymmetry and difficulties in collecting evidence, results in a high rate of loss for the plaintiffs in antitrust private actions.[54] Unlike the victims, the procuratorate is funded by the country and equipped with investigatory power, so the procuratorate is more capable of confronting the lawbreakers.[55] Hence, if the victims fail to take any action or no particular victim can be identified, the procuratorate is prepared to initiate PIL to safeguard the public interest.

Second, concerning the meaning of public interest in the context of antitrust. Pursuant to Article 1 of the AML, the law aims to "*protect fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests.*" Article 60 of the AML states that the procuratorates can initiate PILs when "*undertakings engage[d] in monopolistic practices and harm the public interest*." However, the law does not define "public interests." Therefore, what do public interests mean in the context of antitrust?

Unfortunately, there is no consensus among scholars on the definition of public interest.[56] The definition of public interest, as Peritz argued, is essentially a political choice.[57] A study of the concept of public interest in antitrust law shows that its definition has experienced radical changes throughout history and is closely related to the goals of competition law. Thurman Arnold set the stage for modern antitrust law by defining public interest narrowly.[58] Before then, some would define public interest broadly as fair competition, equality, redistribution, and the realization of benefits to society at large, etc. Then, Arnold confined it to "consumer welfare".[59] With the rise of the Chicago School in the 1960s, consumer welfare was reidentified as "consumer surplus".[60] In economics, consumer surplus refers to the difference between (1) the highest price consumers are willing and able to pay and (2) the price they pay for a product or service. This definition seems to be welcomed by the Chinese antitrust community. For example, Chen (2018) proposes using consumer surplus to define public interest for antitrust PILs.[61]

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[54] Shi, *supra* note 13.

[55] Li Jian (李剑), Fan Longduan Siren Susong Kunjing Yu Fan Longduan Zhifa de Guanzhihua Fazhan (反垄断私人诉讼困境与反垄断执法的管制化发展) [Difficulties of Anti-monopoly Private Litigation and the Regulative Development of Anti-monopoly Law Enforcement], 5 FAXUE YANJIU (法学研究) [CHINESE JOURNAL OF LAW] 70, 71–74 (2011).

[56] Christopher R. Leslie, Antitrust Law as Public Interest Law, 2 U.C. IRVINE. L. REV. 885, 885 (2012).

[57] Rudolph J. R. Peritz, Foreword: Antitrust as Public Interest law, 35 N.Y. L. SCH. L. REV. 767, 773 (1990).

[58] Dina I. Waked, Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice, 65 The Antitrust Bulletin 87, 92–95 (2020).

[59] *Id.* at 92, 94.

[60] *Id.* at 94–96.

[61] Chen Yunliang (陈云良), Fan Longduan Minshi Gongyi Susong: Xiaofeizhe Zaoshou Longduan Sunhai de Jiuji Zhilu (反垄断民事公益诉讼: 消费者遭受垄断损害的救济之路) [Civil Public Interest

Notwithstanding the definition being adopted, in practice, the Chinese procuratorate has to measure the magnitude of public interest under the PIL regime. This is because the procuratorate has to decide if a given violation has harmed the public interest sufficiently to justify initiating a PIL. Moreover, with limited resources, the procuratorate has to prioritize prosecuting the cases that harm the public interest most. However, it is difficult to observe and measure public interest. Wang (2005) argued that public interest may be seen as a combination of the individual interests of the majority.[62] Various theories have tried to set the standard of consumer public interest based on the number of victims, subjective consumer damage, or objective economic order.[63] Among these proposals, the number of consumers being affected should serve as a good proxy for measuring consumer public interest since the number is easy to observe and directly correlates to consumer surplus. This means that if one accepts that public interest in the context of antitrust represents the aggregate interest of relevant consumers, then the magnitude of public interest undermined is positively correlated with the number of consumers being harmed.

Notably, in the context of public interest, consumers being harmed are not limited to consumers who paid an overcharge resulting from an antitrust violation. One important feature of public interest is its diverging influence.[64] Antitrust injuries spread across society rather than buyers alone.[65] Moreover, the public interest is undermined even if the nonbuyers suffer no financial loss.[66] For example, antitrust violations often result in hand-by-hand higher prices and lower outputs. Consumers who end up paying the high monopoly price suffer financial loss. However, the monopoly price and reduced supply would leave some would-be buyers with no purchase. Since they did not make a purchase, strictly speaking, these would-be buyers suffer no financial loss. Nevertheless, the would-be buyers suffer from failing to enjoy the product, and the corresponding consumer surplus will decrease. To society, this constitutes a *deadweight loss*.[67] Thus, an infringement harms not only the interest of purchasers but also would-be buyers.[68] Therefore, when assessing the magnitude of harm to the public interest, one should consider not only the number of relevant purchasers alone but also the number of relevant would-be purchasers whenever possible.

Litigation in Anti-monopoly Field: Approach to Consumers' Relief], 40 Xiandai Faxue (现代法学) [MODERN LEGAL STUDIES] 130, 133–134 (2018).

[62] Wang Jingbin (王景斌), Gonggong Liyi Zhi Jieding: Yige Falixue Shijiao (公共利益之界定：一个法理学视角) [The Definition of Public Interest: A Jurisprudential Analysis on the Basic Category of Public Law], FAZHI YU SHEHUI FAZHAN (法制与社会发展) [LAW AND SOCIAL DEVELOPMENT] 131 (2005).

[63] *Id.*; YAN YUNQIU (颜运秋), GONGYI JINGJI SUSONG: JINGJI SUSONG TIXI DE GOUJIAN (公益经济诉讼：经济诉讼体系的构建) [ECONOMIC PUBLIC INTEREST LITIGATION: BUILDING THE LITIGATION SYSTEM OF ECONOMIC LAW] 41 (2008); Chen, *supra* note 61, at 133–34.

[64] Chen, *supra* note 61, at 131.

[65] Hu, *supra* note 2, at 38.

[66] *Id.*

[67] JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 206 (1995).

[68] Chen, *supra* note 61.

The above discussion concerning the definition and measurement of public interest has implications for the procuratorate's enforcement policy. This is because, as shown in the statistics before, the procuratorate has limited resources and cannot bring all antitrust cases to the courts.[69] Therefore, the procuratorate must prioritize certain cases. In light of the aims of the AML and the purpose of PILs, the procuratorate should maximize public interest under constraints. If we agree that consumer interest represents the public interest in the context of antitrust, then the procuratorate could maximize the country's public interest by comparing both (1) the number of consumers harmed and (2) the magnitude of average harm per consumer across the cases it has in hand. For example, upon investigating two cases, *ceteris paribus*, if the procuratorate can only initiate one PIL, the procuratorate should prioritize the case that harmed a larger number of consumers; if two cases harmed the same number of consumers, then the procuratorate should prioritize the case that caused a greater average harm per consumer.

Third, concerning the procedures and remedies of antitrust PILs. In June 2021, China's Supreme People's Procuratorate issued the *Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates* (2021 Rules of the Procuratorates) that laid out the procedures for PILs.[70] The procuratorate could learn about the existence and obtain clues about antitrust violations from public complaints, its own investigation, other government departments' referrals or media reports, etc.[71] After gathering these clues, the procuratorate would conduct a preliminary investigation.[72] If the procuratorate then believes that there was indeed an antitrust violation and public interest has been undermined, the procuratorate should open a case for investigation.[73] Upon investigation, if the procuratorate finds that the case meets the criteria for prosecution and the public interest has not yet been effectively protected, it would first make a public announcement via mainstream media to notify the public about the illegal conduct that has harmed the public interest.[74] The notice period lasts for thirty days. Among other things, the notification informs eligible parties (e.g., victims) that they could file their own lawsuits against the lawbreaker(s) in the court. Here, the eligible parties are not obligated to sue, and there is no consequence for them to take no action. Also, these parties who sit on their right would not be barred from bringing a private action after the PIL regime has been exhausted. If the eligible parties do start a private action, the procuratorate *may* opt not to initiate a PIL. It is because Article 90 of the

[69] *Supra* Part 2.1.

[70] Renmin Jianchayuan Gongyi Susong Ban'an Guize (人民检察院公益诉讼办案规则) [Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates] (promulgated by the Sup. People's Proc. Jun. 29, 2021, effective Jul. 1, 2021) [hereinafter "Rules of the Procuratorates"].

[71] Rules of the Procuratorates, art. 24.

[72] Rules of the Procuratorates, art. 27.

[73] Rules of the Procuratorates, art. 28, 85.

[74] Rules of the Procuratorates, art. 90, 91.

Rules of the Procuratorates enumerates the circumstances in which the procuratorate should close a case file upon investigation.[75] And Article 90(6) is a fallback provision that permits the procuratorate to do so in "any (other) situations which require the case to be terminated".[76] This fallback provision essentially provides the procuratorate with great discretionary power to decide whether to drop a case. For instance, the procuratorate could find that there is no need to initiate a PIL if victims have already started a private action, hence terminating the case based on Article 90(6). However, it is not mandatory for the procuratorate to apply the fallback provision and drop the case, so an antitrust law infringer may face both a PIL and private action concurrently (but separately). In contrast, if the eligible parties choose not to sue, the procuratorate shall file a PIL in court.[77]

The remedies of PILs are set out in Article 98 of the 2021 Rules of the Procuratorates.[78] It permits the procuratorate to bring a claim to require the defendant to cease the injury, remove the obstruction, eliminate the danger, restore the original state, and pay compensation for the loss (i.e., compensatory damages), among others. These are *general remedies* available to all types of PILs. The Rules further specify *special remedies* in PIL of different fields that correspond to the nature of the harm. For environmental PILs, special remedies include restoration of the ecological environment, reimbursement of restoration expenses, and punitive damages. For food and drug safety PILs, special remedies include punitive damages and specific performance to recall and dispose of the related food and drugs. The Rules do not set out special remedies for antitrust PILs, which is unsurprising because antitrust PILs were introduced in 2022 after the Rules were issued. In short, as of today, the major remedies that victims could expect from antitrust PILs are a cease of illegal conduct and compensatory damages.

Notably, PILs may involve illegal conduct that harms many individuals, but no victim is identified and specified in the litigations. This gives rise to the question of how to distribute compensation in these cases. Unfortunately, no rule addresses this issue, and different courts may handle the matter differently because China has adopted a civil law system without the doctrine of precedent. Take a PIL decided by the *Intermediate People's Court of Wuxi Municipality in Jiangsu Province* for reference.[79] In 2019, the Wuxi municipal procuratorate successfully prosecuted a consumer protection PIL that affected a large number of unspecified consumers. The court ordered the convicted parties to pay compensatory and punitive damages. Regarding the distribution of damages, the court held that the unspecified consumers were harmed, so the

[75] Rules of the Procuratorates, art. 90.

[76] *Id.*

[77] Rules of the Procuratorates, art. 46, 89–90.

[78] Rules of the Procuratorates, art. 98.

[79] Jiangsusheng Wuxishi Renmin Jianchayuan Su Fan Moumou Deng Xiaofei Minshi Gongyi Susong An (江苏省无锡市人民检察院诉范某某等消费民事公益诉讼案) [Jiangsu Province Wuxi Municipal People's Procuratorate v. Fan Moumou et al. Consumer Civil Public Interest Litigation Case], (2019)苏02民初585号 (JiangSu Interm. People's Ct. 2020) [hereinafter "Jiangsu Province Case"].

compensations belonged to them. However, since none of those consumer victims had made a claim yet, the compensation would be kept by a 'consumer public interest fund'. Then, after the statute of limitations for the consumer victims to sue expired, the fund would utilize the unclaimed compensation to enhance consumers' interest. However, at that time, a 'consumer public interest fund' had not been established. Thus, the court ordered the compensation to be temporarily kept by itself first. After a fund was established, the court would transfer the compensation to the fund. If no such fund was eventually established, the court would transfer the compensation to the national treasury instead.

III. THE TENSION BETWEEN PUBLIC INTEREST LITIGATIONS AND PRIVATE ACTIONS

As seen, the development of antitrust PILs is significant to China as it not only safeguards public interest but also provides effective remedies to victims. However, before the introduction of the PIL regime, the country had already been relying on traditional public enforcement and private enforcement to combat infringers of its Anti-Monopoly Law. Therefore, it is worth examining the interplay between the PIL regime and other enforcement mechanisms. Below, via cost-benefit analysis, we will explain why victims have an incentive to free ride the PIL regime and how free-ridings harm society.

A. The Incentive to Free Ride

As shown above, antitrust PILs offer victims two major remedies – cessation of illegal conduct and damages. These remedies are also available under private antitrust enforcement and are exactly the main incentives for victims to sue. Therefore, eligible victims[80] could obtain the same remedies by either (1) initiating a standalone private action themselves or (2) reporting the violation to the procuratorate and asking the procuratorate to claim damages for them. Thus, PILs could be viewed as a substitute for private actions. This alternative is only available to eligible victims because PILs can only be used to pursue violations that undermine the public interest. However, since most antitrust violations harm a vast number of consumers, the procuratorate should

[80] Here, eligible victims refer to victims who suffered from an anti-competitive conduct that undermined public interest, but at the same time, have standing and financial capability to bring a private action. Article 60 of the AML provides standing to persons who is harmed by an anti-competitive conduct. As explained, anti-competitive conduct could harm both purchasers and would-be purchasers. Purchasers (no matter direct or indirect) certainly have standing in China. Fang Qi, Private Antitrust Litigation in China: Overview, Thomson Reuters, at 3 (Jan. 1, 2018), https://uk.practicallaw.thomsonreuters.com/5-631-1871?transitionType=Default&contextData=(sc.Default)&firstPage=true. Hence, some of the purchasers might be able to free-ride the PILs regime. In contrast, non-purchasers do not seem to have standing in China. At least, to our best knowledge, we have not come across such a precedent. Thus, while would-be purchasers could seek the procuratorate to initiate a PIL for them, they could not free-ride the PIL regime since starting their own private action is never an option, regardless of financial capability.

almost always find that consumer interests, and hence the public interest, have been harmed. Therefore, the extension of the PIL regime to the antitrust field has implications for the development of private antitrust enforcement as well. To examine the impact on private enforcement, one has to put himself in the shoes of a victim and compare the expected costs and benefits between filing a private action and reporting to the procuratorate.

First, concerning the benefit side. As aforementioned, victims of antitrust violations want the harm they are facing to be halted (i.e., cessation of illegal conduct) and the loss realized to be compensated (i.e., damages). Both PILs and private actions provide these remedies.[81] However, any given victim perceives different expected benefits from the two forms of enforcement. This is because expected benefits account for not only the amount of the remedies the victim could receive from enforcement but also the likelihood of successfully receiving those remedies. In a PIL or private action, to obtain damages, a plaintiff must persuade the court that (1) the defendant has violated the law, (2) the plaintiff has suffered a loss, and (3) the loss was caused by the defendant's illegal conduct.[82] It is often quite challenging to prove these elements.[83] For example, anti-competitive agreements are usually formed secretly, so it is hard for the plaintiff to collect sufficient evidence to prove their existence.[84] In the absence of direct evidence, the plaintiff has to rely on circumstantial evidence instead, but such evidence is difficult to gather as well.[85] Furthermore, antitrust litigations require the use of economics, imposing challenges to the plaintiff side. For instance, the plaintiff side may need to present economic evidence and conduct economic analyses to prove the existence of an antitrust violation,[86] the causation between the plaintiff's injury and such violation,[87] and the amount of damage.[88] In these regards, the procuratorate has advantages over the victims and their legal representations. This is because the procuratorate is equipped with broad investigative power. For example, the procuratorate could (1) interview defendants, witnesses, and related parties; (2) inspect the relevant scenes and collect evidence; (3) seek opinions from experts, other government departments, or industry associations; and (4) entrust appraisal, evaluation,

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[81] Rules of the Procuratorates, art. 98.

[82] Abbot B. Lipsky et al., Private Antitrust Damage Actions in China: An Emerging Force?, LATHAM & WATKINS (Aug. 29, 2016), https://www.lexology.com/library/detail.aspx?g=9ac9cdd2-c96d-46e3-90c5-cdc08a0bc7a8.

[83] Jay Himes, The Long and Winding Road…To Trial: Perspectives of a Plaintiffs' Antitrust Practitioner, HLS ANTITRUST ASSOCIATION (Feb. 11, 2021), https://orgs.law.harvard.edu/antitrust/2021/02/11/the-long-and-winding-road-to-trial-perspectives-of-a-plaintiffs-antitrust-practitioner/.

[84] Christopher Leslie, The Decline and Fall of Circumstantial Evidence in Antitrust Law, 69 Am. U. L. REV. 1713, 1714–20 (2020).

[85] *Id.*

[86] OECD Report, Prosecuting Cartels without Direct Evidence, DAF/COMP/GF(2006)7 (Sep. 11, 2006) 30–31.

[87] Anne Hartnett, Keep Calm and Causation On: Reframing Causation Analysis in Private Section 1 Antitrust Actions at Summary Judgement, 102 IOWA L. REV. 2291, 2291–94 (2017).

[88] Michelle Burtis & Keler Marku, Proving the Fix: Damages, GLOBAL COMPETITION REVIEW (Nov. 22, 2021), https://globalcompetitionreview.com/guide/private-litigation-guide/third-edition/article/proving-the-fix-damages.

audit, inspection, testing and translation.[89] In addition, the procuratorate is funded by the state, and it has expertise and experience in crime investigations. In the absence of relevant power, resources and expertise, a private action led by the victim has a smaller chance of success compared to a PIL led by the procuratorate. Hence, victims perceive higher expected benefits from reporting a violation to the procuratorate than from initiating a private action by themselves.

Second, concerning the cost side. It is costly for victims to initiate a private antitrust action. First, a victim plaintiff must hire a private lawyer and pay attorney fees. Attorney fees are often quite expensive and account for the majority of the plaintiff's litigation cost. Second, the victim has to pay a litigation fee, which includes a case acceptance fee and an application fee.[90] The litigation fee also includes witnesses, appraisers, translators and adjusters' transportation, accommodation, living expenses and loss of income subsidies incurred for appearing in court.[91] Third, as mentioned, the victim plaintiff must prove several essential elements to win the case and obtain damages. However, it is costly to perform these tasks (hereinafter legal costs). For example, the plaintiff must prove that the defendant has violated the competition law. This requires the plaintiff to conduct investigations and collect evidence to support his or her claims. Moreover, the plaintiff must prove that he or she has suffered a loss in light of the defendant's illegal conduct. To do so, the plaintiff might need to hire economists to evaluate the magnitude of the damages he or she suffered (e.g., the difference between the monopoly price and competitive price).

According to China's Supreme People's Court, in practice, courts normally require plaintiffs and defendants to bear their own attorney fees and other legal costs, regardless of who wins or loses.[92] In contrast, the law requires the losing party to pay the litigation fee.[93] However, the AML offers an exception to these general rules. In 2012, the Supreme People's Court issued rules about civil antitrust litigations[94] and introduced a one-way fee-shifting rule. Article 14 of this rule concerns the remedies of prevailing plaintiffs and stipulates that upon

[89] Rules of the Procuratorates, art. 35.

[90] Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Measures for the Payment of Litigation Fee] (promulgated by St. Council, Dec. 8, 2006, effective Apr. 1, 2007) art. 6 (Chinalawinfo).

[91] *Id.*

[92] "Lüshifei" You Baisufang Chengdan 12 Zhong Qingxing ("律师费"由败诉方承担12种情形) [A Summary of 12 Situations here the Losing Party Bears Attorney Fees, LUOYANG INTERMEDIATE PEOPLE'S COURT, HENAN. P.R. CHINA. 03,] (July 2020), http://hnlyzy.hncourt.gov.cn/public/detail.php?id=10036; Guodong Du, Attorney's Fees in China: Does the Losing Party Pay?, China Justice Observer (Sept. 01, 2019), https://www.chinajusticeobserver.com/a/attorneys-fees-in-china-does-the-losing-party-pay#google_vignette.

[93] Measures for the Payment of Litigation Fee, *supra* oten 90, at 29.

[94] Zuigao Renmin Fayuan Guanyu Shenli Yin Longduan Xingwei Yinfa de Minshi Jiufen Anjian Yingyong Falü Ruogan Wenti de Guiding (最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定) [Provisions of the SPC on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct] (promulgated by Sup. People's Ct. May. 3, 2012, effective Jun. 1, 2012) (2012), art.14 (Chinalawinfo).

request of the plaintiff, when calculating the damages, the court may include the reasonable expenses paid by the plaintiff for investigating and stopping monopolistic behaviours.[95] Thus, if a plaintiff prevails in court, he or she could request the defendant to reimburse their attorney fees, litigation fees and other legal costs. However, the law does not allow a defendant to seek reimbursements from the plaintiff if the former wins the case. That is why the rule is referred to as a 'one-way' fee-shifting rule. This rule greatly reduces but does not eliminate the expected cost of victims starting a private antitrust action. This is because there is always a chance of a plaintiff losing the case in court. If so, the plaintiff is responsible for not only his or her attorney fee, litigation fees and legal costs but also the defendant's litigation fees. Furthermore, plaintiffs of a private antitrust action must work closely with their attorney to prepare for the lawsuit. Given the complexity of antitrust litigations, these cases normally require more time to be resolved than other civil litigations.[96] To antitrust plaintiffs, this means that they have to bear very large time costs, which cannot be reimbursed by the defendant even after a judgment is obtained. In sum, the expected cost for a victim to initiate a private antitrust action is substantial.

Instead of starting their own private action, victims of an antitrust violation could report the case to the procuratorate and ask the procuratorate to initiate a PIL to seek compensatory damages for them. If the procuratorate agrees to do so, it does not charge the victims any fee, regardless of the outcome of the case. Hence, the procuratorate absorbs almost all of the costs and risks of litigation. The remaining cost that has to be borne by the victims is time costs, as the victims still need to spend time communicating with the procuratorate (e.g., to explain their suspicions and adduce evidence in their possession). That said, since the victims are no longer the plaintiffs in a PIL, they could expect to commit far less time to litigation.

Taking both the benefit and cost sides into account, it is not difficult to see that some victims prefer reporting their cases to the procuratorate rather than initiating their own private action. As explained, for one thing, victims perceive a higher expected benefit from PILs than from private action since the procuratorate has a greater chance of prevailing in court thanks to its investigatory power, resources and expertise, hence a greater chance of ceasing the illegal conduct that has been hurting them and obtaining damages. For another thing, victims perceive a lower cost from PILs than private action, as the cost of the former is borne by the procuratorate, while the victims themselves bear the cost of the latter. This means that victims could obtain better results at a lower cost (in fact, almost no cost) by reporting a violation to the procuratorate. In other words, victims may expect a larger net benefit (i.e., expected benefit minus expected cost) from reporting to the procuratorate than from starting their own lawsuit. As such, some victims who could have initiated

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[95] *Id.*

[96] Sinchit Lai, Output Effect of Private Antitrust Enforcement, 27 FORDHAM J. CORP. & FIN. L. 477, 514–16 (2022) (discussing the high legal cost caused by antitrust litigations).

their own private action face a strong incentive to report cases to the procuratorate and free-ride its effort.

Sceptics may argue that the free-riding problem may not be serious or exist because, when victims' claim is weak (e.g., the alleged violation is questionable), victims may prefer pursuing a private action rather than a PIL as they are allowed to give pressure the defendants to settle in a private action.[97] In other words, there is no incentive to free-ride because PIL does not allow victims to play the same tactic. We disagree with this viewpoint since a rational victim with a weak claim would also find it attractive to free-ride the PIL regime. The ultimate goal for victims to settle is still to obtain compensation. Importantly, victims would expect less compensation and at a higher cost from settlements. On the benefit side, victims might be fully compensated by a PIL, but they could never obtain full compensation via settlement since the Chinese antitrust law only provides single damage. On the cost side, as explained, it costs nothing for the victims to free-ride the PIL regime. In contrast, for private actions, although it is less costly for the victims to settle instead of obtaining a judgment, it remains costly for the victims to initiate a private action. In short, even with a weak claim and the possibility of settlement in private action, there remains an incentive for victims to free-ride the procuratorate's effort.

B. The Consequences of Free Ridings

As shown above, the PIL regime provides incentive for some victims to free ride the procuratorate's effort, and hence discourages private enforcement. However, one may not conceive free-riding as a "problem." Sceptics may argue that the PIL regime provides a strong incentive for victims to report violations to the procuratorate, helping the procuratorate to detect and combat more illegal practices. As long as illegal practices are ceased and victims are compensated, it does not matter whether the plaintiff is the procuratorate or the victim. Hence, one might argue that free riding is acceptable for society. Below, we will explain why such a view is incomplete and why free-riding could be a problem to China.

The major goal of the PIL regime is to safeguard the public interest. Thus, in practice, the regime should strive to maximize the public interest. Earlier, we explained that the procuratorate could do so by giving priority to prosecuting violations that harmed public interests more (e.g., those involving more victims and/or doing greater harm per victim).[98] However, this is the only consideration from the procuratorate's perspective. From the country's perspective, the calculation is different because, in addition to PILs led by the procuratorate, public actions led by the SAMR and private actions initiated by the victims

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[97] Daniel Sokol, Strategic Use of Public and Private Litigation in Antitrust as Business Strategy, 85 S. CAL. L. REV. 689, 694 (2012) (explaining how treble damages could allow competitor firms to settle with dominant firms for profit).

[98] *Supra* Part 2.2.

could also achieve the same goal of safeguarding public interests. Therefore, the state that oversees the entire competition regime should maximize the public interest generated from all three forms of enforcement, not just from PILs. To do so, the state must consider the interactions among different forms of enforcement. Since this article does not examine the relationship between PILs and SAMR's actions, we leave public actions led by the SAMR out of our discussion. The question is then how free-riding affects the overall public interest in the country.

As aforementioned, sceptics might argue that free-riding is not a problem because the PIL regime simply turned some cases brought by the victims into cases brought by the procuratorate. The transfer is merely a zero-sum game and has no impact on the overall public interest. However, proponents of this view neglect the scarcity of public resources and the opportunity costs of using the PIL regime.

Hypothetical 1 (i.e., the utopia): If the procuratorate *had* unlimited enforcement resources, what the sceptics suggest would be right since all clues would result in a prosecution, no matter if the clues were obtained by the procuratorate via its own investigation or through victims' reports. In such a utopia, the procuratorate would prosecute all cases and then compensate all victims. There would be no need for private enforcement. To understand this, let us consider the following hypothesis. In China, there were two distinct cartels – cartel *X* and cartel *Y* – harming two different groups of consumers – consumer *X* and consumer *Y* – correspondingly. The two cartels caused identical harm to the public interest. Assume that consumer *X* cannot afford to start a private action, while consumer *Y* is willing and able to start a private action. Here, consumer *X* has no choice but to report cartel *X* to the procuratorate, but consumer *Y* could choose either to start a private action or report the case to the procuratorate. Upon conducting a cost and benefit analysis, as explained, consumer *Y* would prefer to free ride on the procuratorate's effort and report the case to the procuratorate. In this case, the procuratorate received two reports, respectively, from consumers *X* and *Y*. If it is given that the procuratorate *had* unlimited enforcement resources, then the procuratorate does not need to choose between prosecuting cartels *X* or *Y*. The procuratorate will prosecute the cartels and obtain damages for both consumers *X* and *Y*. As such, the public interest is maximized because all cartels were ceased and all victims were compensated; hence, the free-riding of consumer *Y* does not undermine the country's public interest.

Hypothetical 2: However, in reality, the procuratorate has limited enforcement resources. Statistics show that the procuratorate opens files for many PIL cases every year but only brings a small fraction of them to the courts.[99] Taking the procuratorate's financial constraint into account, free-riding would undermine the public interest. Let us consider the two-cartels hypothetical again, but with one twist. Now, instead of assuming that the

[99] *Id.*

procuratorate has unlimited enforcement resources, we realistically assume that it has limited resources and could only prosecute one cartel.

As before, consumer *X* reports to the procuratorate because he or she has no choice, and consumer *Y* also reports with the intention to free ride. Again, the procuratorate receives two reports. However, unlike before, due to financial constraints, the procuratorate has to choose one cartel for prosecution. Since consumers' intent is unobservable, the procuratorate would not be able to screen out consumer *Y,* who could have initiated his or her own lawsuit. Given that cartels *X* and *Y* caused identical harm to the public interest, the procuratorate has no preference towards prosecuting cartel *X* or *Y*. Therefore, each cartel has a fifty percent chance of being prosecuted, and we need to consider the two possibilities separately. First, if cartel *X* was chosen for prosecution, then the procuratorate would inform consumer *Y* that it would not prosecute cartel *Y*. As aforementioned, consumer *Y* is willing and able to initiate a private action, so he or she would go ahead and sue cartel *Y*. In this case, both cartels *X* and *Y* would be ceased and penalized; hence, public interest is maximized. Second, if cartel *Y* was to be prosecuted, then the procuratorate would inform consumer *X* that it would not prosecute cartel *X*. However, it is given that consumer *X* could not afford to start a private action, so he or she would take no further action. In this case, cartel *Y* would be ceased and penalized, while cartel *X* would continue to operate and harm consumer *X*. Therefore, the public interest is undermined.

Comparing the utopia in which the procuratorate has unlimited enforcement resources and the realistic hypothetical in which the procuratorate has limited resources, we discover that public interest is always maximized in the former but might be undermined in the latter. In other words, with free-riding, fewer cartels might be ceased, and fewer victims might be compensated. To cartels and potential lawbreakers, this means a lower cost expected for violating the competition law. Therefore, the deterrence effect of the law is reduced, and society should expect more violations.

Hypothetical 3: Nevertheless, sceptics might argue that perhaps most or all consumers are willing and able to start a private action. Then, free riding would not reduce the number of cartels eventually being combatted and hence is not a problem to society. To understand this argument, let us assume that the procuratorate has limited resources (i.e., could only prosecute one cartel) and that there were only two cartels – cartel *Y* and cartel *Z* – and their corresponding consumers. Unlike before, it is now assumed that both consumer *Y* and consumer *Z* are willing and able to bring a private action. In this case, upon receiving reports from both consumers, the procuratorate would arbitrarily select one for prosecution. The remaining cartel that is not being prosecuted by the procuratorate would eventually face a private action. Despite the procuratorate having limited resources, the number of cartels being ceased and penalized is still maximized. As far as public interest being achieved is concerned, Hypothetical 3 is the same as the utopia. However, free-riding is

still harmful to society in Hypothetical 3 because if there was no free-riding, then the procuratorate would not need to prosecute any cartel. From society's perspective, it involves an opportunity cost to fund the procuratorate's work. If all the cartels were punished through private actions, then society could allocate the resources reserved for prosecution for other uses (e.g., education, health, or transportation system developments).In summary, our analysis shows that PIL gives rise to free ridings, causing four problems. First, they discourage victims from taking standalone private actions, hindering the development of private antitrust enforcement. Second, less anti-competitive conduct is being ceased and penalized, hence undermining the public interest. Third, with a lower chance of being sued, lawbreakers and would-be lawbreakers perceive a lower expected cost of engaging in anti-competitive conduct. Hence, free riding reduces the deterrence effect of competition law. Fourth, free riding limits public resources that could have been used for non-PIL uses. From a broad perspective, society should adopt a holistic approach to assess the impact of PILs by considering private enforcement and SAMR actions. Antitrust jurisdictions around the globe are incentivizing private enforcement because they recognize its benefits.[100] A major benefit of private enforcement is in fact to supplement public action that faces serious financial constraints. In the case of China, the promotion of private enforcement could relieve some of the burdens of SAMR's public action and save public resources. However, the introduction of antitrust PIL, which is also a form of public action, offsets the positive developments of private enforcement and reverts some of the financial burden to the country. That being said, the authors acknowledge the need for PIL (e.g., to challenge cartels that harmed public interest greatly when no victims with standing can afford to do so). Therefore, we do not suggest abandoning the PIL regime entirely. Instead, we aim to propose ways to mitigate the free-rider problem.

IV. RECOMMENDATIONS

In light of the aforementioned harms caused by free-riding to society, China needs to navigate through different potential solutions and then select the ones that could effectively address the free-riding problem.

Given that a major consequence of the free-rider problem is the discouragement of private antitrust enforcement, one might suggest that China mitigate the problem by incentivizing private victims to sue. However, this is easier said than done. First, China has long been trying to promote private antitrust enforcement, but limited progress has been achieved.[101] It is mainly because, to an individual victim, the costs of suing often outweigh its benefit (i.e., compensation). The United States is the only country in which private actions play a central role in antitrust enforcement. This success is largely attributed to the availability of opt-out class actions, contingency fee

[100] Pei, *supra* note 18.
[101] Liu, *supra* note 18, at 123.

agreements, and treble damages in the States.[102] However, none of these procedures exist in the Chinese legal system.[103] Despite supporting China to introduce the relevant procedures to promote private antitrust enforcement, this initiative would face huge resistance in the nation because it requires reforming the Civil Procedure Law, and such a reform would have significant implications beyond the antitrust field. Alternatively, China may encourage private antitrust enforcement by subsidizing victims to sue (e.g., in the form of legal aids). However, doing so would add to the financial burden on the Chinese government. Moreover, promoting private actions, no matter by means of legal reform or subsidization, merely mitigates the harm of the free-rider problem rather than the problem itself. Therefore, to address the free-rider problem, it is preferred for China to perfect the antitrust PIL regime instead of promoting private enforcement.

To reform the antitrust PIL regime to address the free-rider problem, the first idea that comes to one's mind is probably to introduce a means test for PILs, similar to the one required for legal aid offered to criminal defendants. If so, in Hypothetical 2, the procuratorate could use the means test to screen out free-rider *Y* and always prosecute cartel *X*. Then, consumer *Y* would initiate a private action, and the number of cartels being combated would always be the same as that in the utopia and maximized. Likewise, in Hypothetical 3, the procuratorate could screen out both free riders *Y* and *Z* and channel enforcement resources to other uses. Unfortunately, this proposal is infeasible because PILs do not require the person who reports to the procuratorate to be a victim of the case. If the procuratorate is allowed to pursue cases reported by non-victims, free riders can circumvent the means test by asking a non-victim to report to the procuratorate. To fix this loophole, a sensible suggestion would be to require the procuratorate to only consider cases reported by victims. However, it would be unreasonable to do so since the existing regime does not even require the plaintiff of a PIL to be a victim. If the plaintiff of "PILs" had to be victims instead of the procuratorate, then this essentially abolishes the PIL regime because such "PILs" that are led by victims are no different from the private actions we have today.

Another idea to perfect the antitrust PIL regime would be to increase the cost of reporting to the procuratorate.[104] For instance, the procuratorate could charge people who reported a violation a fee for the procuratorate to open a file. Ideally, the procuratorate should only charge free riders a fee because the fee is

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[102] Lai, *supra* note 53, at 507–09.

[103] Zhang Ya (张雅), Woguo Fanlongduan Siren Susong Jili Lujing Tanjiu—Jiyu 636 Qi Anjian de Shizheng Fenxi (我国反垄断私人诉讼激励路径探究—基于636起案件的实证分析) [Exploring the Path to Incentivize Private Litigations under China's Anti-Monopoly Law—Empirical Analysis Based on 636 Cases] (2023) (unpublished manuscript) (on file with author).

[104] In the context of traditional public enforcement, to screen out low quality private complaints filed to antitrust authorities, some scholars suggest requiring private complainants to pay a subsidy for public antitrust proceedings. Ilya Segal & Michael Whinston, Public vs. Private Enforcement of Antitrust Law: A Survey 12, Stanford L. School Working Paper No. 335 (Dec. 2006), http://ssrn.com/abstract=952067.

meant to discourage free riding. However, the procuratorate could not distinguish free riders from needy victims who could not afford to sue by themselves because their intent was unobservable, and, as explained, a means test would not be helpful. Then, to compromise, the procuratorate may charge victims only. Nevertheless, again, free riders could send a non-victim to report to the procuratorate on their behalf and circumvent the fee. Therefore, to further compromise, the procuratorate could charge everyone who reports a violation. However, there must be nonvictims who report violations to the procuratorate in good faith and could benefit nothing from PIL. Therefore, it would be unjust for the procuratorate to impose a fee that covers these nonvictims acting in good faith.

In light of the above challenges, we recommend mitigating the free-rider problem by reducing the expected benefits of PILs.[105] The root of the free-rider problem lies in the fact that competition victims could expect a greater net benefit by initiating a PIL rather than a standalone private action. Thus, to address the tension between PILs and private actions, China should reduce victims' expected gain from PILs. Below, we propose two different ways to award damages under PILs to reduce victims' expected gain. We will introduce them and discuss their pros and cons. For illustration purposes, we have created Figure 1 below. The y-axis represents the dollar amount. Hence, the heights of the bars on the right-hand side reflect the magnitude of the corresponding variables. The four bars in the figure correspond to a benchmark and three different scenarios. From left to right, the first bar is included as a benchmark, representing the amount of harm suffered by victims of a competition law violation (denoted as H, where $H > 0$). Then, the second bar represents the case in which the victims initiated a PIL and the court awarded *full* compensatory damages (denoted as F). Full compensatory damages are defined as damages that have an amount equivalent to the harm suffered (i.e., F = H). If the case was brought to the court in the form of a private action instead of a PIL, the victims would receive the same full compensatory damages if they prevailed.

[105] A comparable approach has been articulated by scholars to resolve a similar free-rider problem in which private victims free ride antitrust authorities' effort by filing a follow-on private action instead of a standalone action. Some scholars suggest address this problem by reducing victims' net gain from follow-on actions (e.g., require plaintiffs of follow-on actions to share some of the costs spent in the public action that they piggybacked on). Michael Harker & Morten Hviid, Competition Law Enforcement: the "Free-Riding" Plaintiff and Incentives for the Revelation of Private Information, Centre for Competition Policy Working Paper No. 06-9 (Apr. 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=912180.

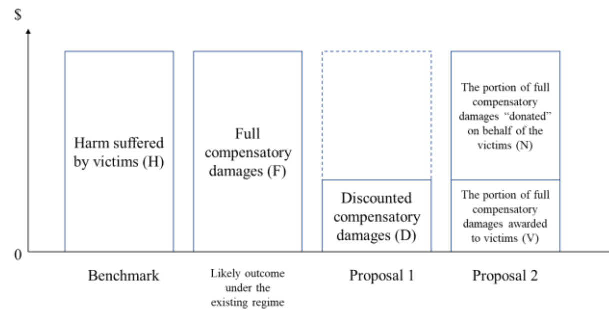

Figure 1: Different ways to award damages under public interest litigations

A. Proposal 1: Discounted Compensatory Damages

To reduce free riders' expected benefit from PILs, the procuratorate could simply consider claiming discounted compensatory damages (D) rather than full compensatory damages (F). The *2021 Rules of the Procuratorates* allow the procuratorate to claim compensatory damages but do not require it to always make such a claim or claim full compensatory damages.[106] This means that the Rules provide great discretionary power to the procuratorate, allowing it to claim 0% to 100% of victims' losses as damages. In other words, the procuratorate could always claim a fraction p (denoted as p, where $0 < p < 1$) of the full compensatory damages, such that the victims could only receive discounted compensatory damage (i.e., $D = pF$) that falls short of the full compensatory damages (i.e., $D < F$).

However, the above does not fully explain why discounted compensatory damage would discourage victims from free-riding the PIL regime. This is because the law does not preclude victims from bringing a private action following a successful PIL and claiming the remaining damages from the follow-on action (i.e., $F - D$). In other words, a victim who first reports to the procuratorate and then files a follow-on private action may be compensated fully. Therefore, it seems that the procuratorate claiming merely discounted compensatory damage does not reduce the expected benefit of PILs and cannot discourage free-riding.

One might come to such a conclusion because he or she has ignored the time value of money. Economics has taught us that one dollar today is worth more than one dollar tomorrow.[107] In our context, this means that victims prefer to receive full compensation as early as possible. Therefore, although the *absolute* value of compensation resulting from (1) a PIL that offers full compensatory damages or (2) a PIL that offers discounted compensatory damage plus a follow-on action is identical, the *real* value of compensation

[106] Rules of the Procuratorates, art. 98.

[107] Valeria Martinez, Time Value of Money Made Simple: A Graphic Teaching Method, 39 J. FIN. EDUC. 96 (2013).

resulting from the latter is smaller. This is because the latter prolongs the claiming process and delays compensation.

Here, one may argue that the time value of money is trivial and could be ignored. Even if the time value of money was neglectable, the procuratorate claiming discounted damage could still discourage free riding because it increases the expected cost of free riding. If PILs always award full compensatory damages, then victims never need to initiate a follow-on private action. As such, all the legal costs are borne by the procuratorate in the PILs, and victims do not need to spend any cost. This means that it is costless to free ride. In contrast, if PILs only award discounted damages, then victims must take a follow-on action to claim the remaining damages. In doing so, victims have to bear legal and time costs, not to mention that there is still a chance of the victims failing to obtain what they claimed in the action.[108] Therefore, if the procuratorate adopts our proposal and claims discounted damages in PILs, victims face a higher cost to free-ride and hence expect a lower net benefit from free-riding.

The main advantage of this proposal is that it does not require any legal reform. If the procuratorate wishes, it could start implementing the proposal right away. However, there is a limitation to this proposal; it discourages free ridings but does not eliminate them. To an extreme, even if antitrust PILs never award any damages to victims (i.e., $p = 0$), victims could still benefit from (1) first seeking the procuratorate to initiate a PIL and then filing a follow-on private action to claim damages (i.e., free-riding) instead of (2) starting a standalone private action. This is because victims could obtain full compensatory damages under either strategy but with less cost and risk via the former strategy. If victims need to successfully claim damages in a private action, they have to prove at least a few elements: (a) the defendant has engaged in illegal conduct; (b) the plaintiffs have been injured; (c) the injury suffered by the plaintiffs was caused by the illegal conduct; and (d) the amount of injury (for deciding the amount of compensation).[109] Since the victims have to prove all these elements by themselves in a private action, they have to bear all the relevant costs and risks. In contrast, if the victims seek the procuratorate to initiate a PIL first, they get the procuratorate to do the hard work of proving the existence of illegal conduct on their behalf. If the procuratorate fails, then the victims could reassess the risk and opt not to take further action. In this case, the victims do not need to bear any cost. In contrast, if the procuratorate succeeds (and assuming it never claims damages), the victims could then proceed to bring a follow-on action to seek compensation. Therein, the victims need not prove the existence of illegal conduct again thanks to the claim preclusion principle.[110] Proving one less element reduces victims' risk and cost.

[108] Infra Part 3.1.

[109] Lipsky, *supra* note 82, at 8.

[110] Zhang, *supra* note 1; Buyu Shiji Sunhai Wei Qianti Siyi Keda Gongyi Bianche—Zuigaofa Chutai Xiaofei Minshi Gongyi Susong Sifajieshi (不以实际损害为前提，私益可搭公益"便车"—最高法出台消费民事公益诉讼司法解释) [Without the Premise of Actual Damage, Private Interests can Take a "Free

Such a reduction could be substantial because, among the four elements, proving the existence of illegal conduct is arguably the hardest since the plaintiffs have the least information about it and are not equipped by the law with investigatory powers.

In sum, even if the procuratorate never claims damages for the victims, the victims would still have an incentive to free ride. Therefore, our proposal for the procuratorate to claim discounted (or no) compensatory damages could only mitigate but not eliminate the free-riding problem.

B. Proposal 2: Full Compensatory Damages Followed by Donations

To further mitigate or eliminate the free-riding problem, China needs to establish a regime in which victims perceive more net benefit from initiating their own private actions than from free-riding. To achieve this, the country may consider reducing the overall compensation victims could obtain from free-riding. This would entail victims receiving less benefit from (1) first seeking the procuratorate to initiate a PIL and then filing a follow-on private action to claim damages (i.e., free-riding) than from (2) starting a standalone private action. This reduction could immediately diminish victims' benefits and, consequently, the net benefit of relying on the procuratorate. When such a reduction is substantial enough, the net benefit of free-riding could become smaller than the net benefit of standalone private enforcement. Victims would then find it more appealing to initiate their own lawsuit rather than free-riding. As such, the free-riding problem could be mitigated or even eliminated.

Nevertheless, this approach would not bring an end to the antitrust PIL regime because, as explained before, victims of some antitrust violations do not have the legal standing or financial resources to sue. For these victims, filing their own private action is not an option. Therefore, although the net benefit of pursuing private enforcement is higher, these victims have no choice but to report the violation to the procuratorate. This outcome is ideal because these are the needy victims whom the PIL regime should primarily support, and the number of violations being combated in China would increase.

However, *how could China reduce the overall compensation victims could receive from piggybacking on the procuratorate?* Unfortunately, this could not be achieved under the current legal system because antitrust victims are entitled to full compensation. Thus, we propose that China amend its AML to reform the antitrust PIL regime by authorizing and requiring judges who decide antitrust PILs to donate a certain percentage of compensatory damages on the victim's behalf for public interest uses (the donation is denoted as N, where $N = pF$).[111] Then, the victims share the undonated damages (denoted as V,

Ride" on Public Welfare—SPC Introduces Judicial Interpretation of Consumer Civil Public Interest Litigation] (2016), Xinhua Net (Apr. 25, 2016), http://www.gov.cn/xinwen/2016-04/25/content_5067719.htm.

[111] *Supra* Figure 1.

where $V = F - N$).[112] Here, unlike in Proposal 1, the procuratorate would claim full, instead of discounted, compensatory damages. Upon deciding the PIL, if the court finds the defendant guilty, the court will award the full damages as claimed but order a portion of the damages to be donated to a fund that would later use the donation to enhance the public interest. For example, the fund could utilize the donation to educate the public about AML to reduce violations and raise victims' awareness. Moreover, in the future, if social organizations were permitted to initiate antitrust PILs, the fund could be used to subsidize such PILs.

Courts donating plaintiffs' compensations for public interest uses is not unprecedented. For example, in the United States, many antitrust private litigations are brought in the form of an opt-out class action.[113] When formed, opt-out class actions by default include all victims as plaintiffs of the class except for those who applied to be excluded.[114] This gives rise to a large number of unnamed plaintiffs who only need to reveal their identities to claim their share of compensation upon the class obtaining a judgment or settlement.[115] However, in practice, many unnamed plaintiffs fail to claim their share within a prescribed period (e.g., some may find the compensation too small and do not bother to make a claim; while others may not be aware of their right to do so or forgot to exercise their right).[116] Therefore, courts have to deal with the unclaimed compensations. As a common practice in the U.S., courts follow the *cy pres* doctrine and donate the unclaimed compensations on behalf of the victims to public interest organizations or charities.[117] In comparison, although Chinese courts do not expressly mention the *cy pres* doctrine in their decisions, they have applied such doctrine in antitrust PILs before. For example, the 2019 Wuxi municipal consumer protection PIL case we referred to when discussing the procedures and remedies of antitrust PILs is a perfect example.[118] Therefore, while our proposal is innovative in the sense that it has not been adopted in any jurisdiction yet, the idea of courts making donations on behalf of plaintiffs is not unprecedented and is feasible. However, our proposal does not fall within the existing scope and application of the *cy pres* doctrine. That is why, as we suggest, it requires legislative efforts in China to authorize courts to adopt and implement our current proposal.

The key difference between the first and second proposals is that, under Proposal 1, victims are allowed to claim the balance of the full compensatory damages in a follow-on private action. Therefore, victims would eventually be

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[112] *Id.*

[113] Darrell Prescott & Catherine Stillman, Competition Litigation in the United States, Baker McKenzie, https://www.globalcompliancenews.com/antitrust-and-competition/competition-litigation/competition-litigation-in-the-united-states/; Lai, *supra* note 53, at Part II.C.2.

[114] *Id.*

[115] *Id.*

[116] Albert A. Foer, Enhancing Competition Through The Cy Pres Remedy: Suggested Best Practices, 24 Antitrust 86, (2010).

[117] *Id.*

[118] *See* Jiangsu Province Case.

fully compensated. In contrast, under Proposal 2, victims are not allowed to claim the donated damages in a follow-on private action, so they could never obtain full compensatory damages if they piggybacked the procuratorate. This ensures that victims benefit less from the PIL regime. How much damage should be donated is a policy question that must be decided by lawmakers. The higher the percentage is, the more free ridings would be squeezed.

It is worth noting that the donation we proposed is different from the special remedies available in PILs of other fields, such as environmental protection and food and drug safety. Recall that the 2021 Rules of the Procuratorates permit the procuratorate to claim special remedies.[119] For example, in environmental protection PILs, the procuratorate could seek special remedies for restoring the ecological environment. As aforementioned, such remedies are not currently available for antitrust PILs. That said, even if the 2021 Rules were later amended to make special remedies available to antitrust PILs, special remedies could not discourage free riding. This is because special remedies are awarded in addition to compensatory damages and are not financed by compensatory damages. Thus, courts awarding special remedies does not preclude victims from claiming full compensatory damages. In contrast, the proposed donation is paid out of victims' compensatory damages. Thus, it bars the victims from being fully compensated at or after PIL.

The current proposal could address the free-rider problem, but one might consider it unjust because it deprives certain victims' right to be fully compensated. To understand this, let us assume there is a group of consumers being harmed by the same illegal conduct. For the sake of simplicity, let us assume there are only two victims in the group – victim *V* and victim *W*. It is given that victim *V* is financially capable of starting his own private action against the lawbreaker, while victim *W* is not. If our proposal is adopted, as demonstrated, victim *V* would be better off if the case proceeds as a private action, while victim *W* only has the option of asking the procuratorate to initiate a PIL. Society prefers the case to be resolved through private enforcement because the government could channel scarce public resources to other uses. However, the case may end up being resolved by means of a PIL. This is because (1) victim *W* may learn about the violation before victim *V* and/or (2) both victims are aware of the violation, but victim *W* may not know victim *V* and victim *V*'s intent to file a private action. Therefore, self-interested victim *W* could not piggyback victim *V*'s effort and would report to the procuratorate.

According to our proposal, the court would award full compensatory damages to all victims, comprising *V* and *W*, and order a percentage of the damages to be donated. The court would not award damages to victim *W* only because PILs serve the interest of the public, not only the victim who reported the violation to the procuratorate. For instance, as seen in the 2019 Wuxi municipal consumer protection PIL, the court awarded damages to unspecified

[119] Rules of the Procuratorates, art. 70.

victims.[120] Continue with our proposal; since the court has donated a portion of the damages on behalf of the victims, the victims are barred from claiming the same amount of damages in follow-on actions. Victim *V* could have initiated a standalone private action and claimed full compensatory damages. However, due to the PIL triggered by victim *W*, victim *V* ended up with less compensation. This outcome is unfair to victim *V*.

In light of the above, we further propose to amend the 2021 Rules of the Procuratorates. Recall that the Rules require the procuratorate to make a public announcement for thirty days upon investigation.[121] The Rules require the procuratorate to inform eligible parties (e.g., victims) that they could file their own lawsuit against the lawbreaker(s) in court.[122] However, under the existing Rules, there is no consequence for these parties to take no action. In contrast, our Proposal 2 creates consequences for parties who sit on their right because they could no longer be fully compensated once the court makes a donation on their behalf in a PIL. Thus, to be fair to the victims, especially those who are financially capable of suing (such as victim *V* in our hypothetical), we propose amending the 2021 Rules to require the procuratorate to remind antitrust victims of the abovementioned consequence (i.e., a reminder requirement). As such, victims would be properly informed and be given a chance to exercise their right to seek full compensation via private enforcement.

Nevertheless, even if victims who do not want to free-ride the procuratorate's effort try to avoid the donation by filing their own private actions, these victims might not be fully compensated under the current system. It is because the 2021 Rules give the procuratorate discretion to initiate a PIL even after the victims started a standalone private action.[123] This means that a PIL and private action against the same lawbreaker(s) may be carried out concurrently (but separately). In this situation, if the PIL concluded before the private action, and the court that heard the PIL has donated part of the damages already, then the good faith victims could not be fully compensated.

To address the above problem, we recommend China to further amend its 2021 Rules to preclude the procuratorate from initiating an antitrust PIL if a relevant standalone private action has been commenced by the end of the 30-day notice period. In other words, if at least one of these victims starts a private action before the end of the notice period, the procuratorate could not initiate a PIL (i.e., a preclusion requirement). Then, in the standalone private action, the plaintiff(s) could seek full compensation as usual. Conversely, if none of the victims acts before the end of the notice period, the procuratorate will file a PIL in court as planned. Subsequently, if the victims file a follow-on action, our proposal for the court to award full compensatory damages followed by donation would kick in.

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[120] *See* Jiangsu Province Case.
[121] Rules of the Procuratorates, art. 91.
[122] *Id.*
[123] Rules of the Procuratorates, art. 90.

With both the reminder and preclusion requirements, our proposal ensures that victims who are financially capable of suing are given a chance to exercise their right to be fully compensated while leaving little incentive for antitrust victims to free ride the antitrust PIL regime. In the absence of free riding, the PIL regime would no longer hinder the development of private antitrust enforcement in China. Then, with the joint effort of the procuratorate and private litigants, China could combat more anti-competitive conduct, fulfilling the objective of the PIL regime to maximize public interest.

V. CONCLUSION

In 2022, China amended its Anti-Monopoly Law, which, inter alia, extended the then-existing public interest regime to the antitrust field. Since then, when antitrust victims want to seek compensation, they could either (1) file their own private action and claim damages by themselves or (2) ask the procuratorate to initiate a public interest litigation to claim damages for them. Upon conducting a cost and benefit analysis, this article discovers that the introduction of the new form of antitrust enforcement could give rise to a free-riding problem. This is because, under either approach, victims could obtain full compensatory damages. However, victims have to bear the risk and cost of litigation in private actions while shifting all these burdens to the procuratorate in PILs. Free ridings harm China in several ways. First, they hinder the development of private antitrust enforcement in the country. Second, they reduce the overall amount of anti-competitive conduct being combatted, undermining the public interest. Third, they reduce the deterrence effect of the competition law. Fourth, they drain the nation's scarce public resources that could have been allocated for other constructive uses.

Two solutions for mitigating the free-riding problem are offered in this article. First, we propose that the procuratorate merely claims discounted compensatory damage in antitrust PILs. Although free riders could still claim the remaining compensatory damages in a follow-on private action, they have to bear the risk and cost in such an action. This proposal, therefore, increases the cost of free riding. Unfortunately, even though this proposal could discourage free ridings, it could not eliminate them because the heightened cost of free-riding could still fall short of the cost of initiating a standalone private action.

In light of the above, we further propose that China amend its Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates (2021) to require courts that hear antitrust PILs to award full compensatory damages but always donate a portion of the damages on behalf of the victims to enhance public interest. This ensures that victims benefit less from the PIL regime than from standalone private enforcement, further discouraging free ridings. Since the donation would bar victims from obtaining full compensation, we further recommend that when the procuratorate notifies the public of its plan to initiate a PIL, the procuratorate should not only remind victims that they have a right

to file a private action but also remind them of the consequences of sitting on their right. Furthermore, the procuratorate should be precluded from filing a PIL if a relevant standalone private action has commenced before the end of the notice period. These requirements ensure that all victims are given a chance to exercise their right to obtain full compensation via private enforcement while leaving little incentive for the victims to free ride the antitrust PIL regime.