

Probing into Plaintiff Eligibility for Civil Antitrust Litigation

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Article 50 of the Chinese Antitrust Law provides: “A business operator that performs a monopolistic act and inflicts damage to other persons shall be held civilly liable.” This expressly shows that, under the Chinese law, civil litigation is the form of enforcement of the Antitrust Law. The public in China expect highly of the civil procedure under the Antitrust Law. On the very first day when the Antitrust Law entered into force, the courts received several lawsuits. In the early days of the antitrust civil procedure in China, the plaintiff eligibility was an issue worth probing into and addressing. Under the Chinese Civil Procedure Law, a plaintiff must be a citizen, a legal entity or any other organisation having his or its interest directly at stake in a case of the nature. In addition, based on Article 50 of the Chinese Antitrust Law, the plaintiff instituting a civil antitrust action must be one having his or its interest directly at stake in the monopolistic act, i.e. one suffering injury because of the monopolistic act in suit. The scope of those suffering injury because of the monopolistic acts, namely the scope of plaintiffs, should be determined by the people’s court. Too broad a scope of the plaintiffs would lead to too many lawsuits, adding great burden to the courts; too narrow a scope is not conducive for an individual to bring an antitrust action, and makes it unlikely for a true infringer to recover damages.¹ To date, the determination of the eligibility of the plaintiffs mainly involves the issue of the eligibility of consumers, competitors, and consumers organisations, industrial organisations and local governments, and the issue of remedies for group victims. All these issues will be separately dealt with in the article.

I. Consumers’ eligibility to sue

Whether a consumer is eligible to sue is an issue closely related to the legislative aim of the Antitrust Law. Article 1 of the Chinese Antitrust Law expressly provides that the Law has been formulated with a view to “preventing and ceasing

monopolistic acts, maintaining fair competition in the market, improving the efficiency of economic operation, safeguarding the interests of the consumers and the public at large, and promoting the healthy development of the socialist market economy”.²

Law provisions concerning whether consumers are eligible plaintiffs to bring antitrust action vary from country to country. When considering the consumers eligibility for litigation, the US courts take account of the directness of damages. A consumer is entitled to sue a direct supplier for his monopolistic act to seek triple damages.³ If the direct supplier’s act is not unlawful, a consumer does not have the right to claim triple damages for the joint act of a manufacturer and its competitor to raise the price of the goods.⁴ The Japanese law is fully affirmative towards the consumers’ right to claim damages under the Antitrust Law.⁵ In Osaka Gas Oil case, the Tokyo High Court recognised that the consumer was one claiming damages under Article 25 of the Law for Prohibiting Private Monopoly and Ensuring Fair Trade.⁶

For this writer, the US practice of restricting consumers’ eligibility to sue is not suitable in China. The US courts’ reason for doing so is that absence of such restriction is likely to result in duplicate recovery, make it more difficult to calculate and distribute the amount of damages and rendering the damages less certain, which would consequently add burden to the courts and increase litigation costs. Besides, with more plaintiffs involved in litigation with diversified litigant interests, the triple-damages litigation becomes less effective in ceasing acts violating the law.⁷ All these reasons are there out of the consideration of the judicial policy. The basic doctrine underlying the civil damages under the law in China is the doctrine of equity. If a rightholder can prove his or its injury caused because of an illegal monopolistic act, the law-breaker should be held liable for the damages. There exists no such issue as multiple damages. In the early phase of implementing the Antitrust Law in China, increased litigation costs

and courts' burden or workload should not justify any restriction of consumers from instituting legal procedure. Therefore, China should adopt the same policy as that adopted in Japan, and hold an affirmative and supportive attitude towards individuals bringing civil suit against monopoly.

Article 50 of the Antitrust Law of China provides that where a business operator that performs a monopolistic act and inflicts damage to "other persons", he should be held civilly liable. For some scholars the "other persons" here "include both businesses and the members of the public."⁸ For some other scholars holding similar views, in the entire process of transaction, consumers are the end bearers of the consequences of a monopolistic act. They should, accordingly, have the right to sue according to the law provisions.⁹

For this writer, the consumers' interests are one of the interests the Antitrust Law is intended to protect, and a monopolistic act, in essence, is one causing prejudice to consumers' interests; hence there is possibility for consumers to be eligible to sue. However, monopolistic acts are varied, and the number of the consumers groups tremendously large. Therefore, for all monopolistic acts, not all consumers "have direct interests at stake" or suffer damages because of a monopolistic act, which is an element mentioned in the Civil Procedure Law of China. Therefore, whether a consumer is eligible should be determined *ad hoc*.

A consumer who has bought, at a higher price, a product from a business abusing its monopolistic position in the market as a result of the anti-competition act is an eligible plaintiff,¹⁰ so are consumers who have bought products from parties to a monopolistic deal, say, various interested parties to a cartel.¹¹ But, for a monopolistic act of the undue concentrated businesses, consumers are eligible to sue only after they preliminarily prove they have their "interest directly at stake" in the act, and have suffered injury because of the act.

II. Competitors' eligibility to sue

Antitrust law differs from the unfair competition law, also a competition law, in that the former protects free competition and is not legislatively intended to directly protect particular competitors, while the latter safeguards fair competition, with protection accorded to the legitimate rights and interests of businesses one of the direct legislative aims.¹² However, when a monopolistic act causes damages to a competitor, it naturally has the right to seek relief. When determining whether a business is eligible to sue, under the Chinese Civil Procedure

Law and Antitrust Law, the standards for making the determination are also whether an interested party has direct interests at stake in the monopolistic act and whether the monopolistic act causes damages to it.

Under the standards for examination of civil cases for putting them on the docket in China, when a competitor brings a civil suit against monopoly, it should submit to the court preliminary evidence to show that its suit meets the requirements set forth in Article 108 of the Civil Procedure Law. In examining whether the claimant has direct interests at stake in the case, the court accepting the case should only make a formal examination of the litigation documents and material to decide on whether the claimant has submitted the preliminary evidence showing that the defendant's act constitutes monopoly and whether the monopolistic act has caused injury to the claimant. If the documents and material are complete, the court should determine that the claimant is eligible as a plaintiff. Whether the defendant's act constitutes an illegal act and whether the claimant has suffered injury because of the illegal act are issues to be addressed in the substantive trial of the case. Therefore, it is also difficult to restrict the eligibility of a business in the docket examination stage. During the substantive trial, so long as the claimant or plaintiff proves that the defendant's act constitutes a monopoly, even if it cannot prove that said act has caused any injury thereto, it still has the right to petition the court to order the defendant to cease and desist from the illegal act. Accordingly, in the civil suit against monopoly, so long as the defendant's act is determined as one of monopoly, it is very difficult to restrict a competitor's eligibility. There is likely to arise the circumstance: when a business performs an act that is possible to be monopolistic, it would arouse many competitors' "indignation", giving rise to a series of lawsuits. Nevertheless, this is not a phenomenon particular to the civil antitrust suit. In a suit against unfair competition, there are cases where one act may cause many competitors to sue.¹³

III. Eligibility of consumers organisations, industrial organisations and local governments to sue

Injury caused by a monopolistic act, especially to consumers, is characterised by dispersivity and by small single amount of damages, though the total amount of the damages to all the victims may be large.¹⁴ Likewise, under some cir-

cumstances, a monopolistic act is likely to prejudice the interests of many businesses in one industry or the interests of businesses in a particular region. How to make efficient and impartial relief available to so many victims and, as well, alleviate the burden on the judicial authorities are issues involving group relief. These issues, specifically, involve whether a consumers organisation, an industrial organisation, or even a local government is eligible to sue. Suit brought by them may be known as representative action, by which is meant that an organisation, such as an industrial or consumers association representing a particular interest group, brings a suit for the interests of its members or those under its protection.¹⁵

1. Whether a consumers organisation is eligible to sue

A consumers organisation's eligibility is accepted in some jurisdictions. For example, the BEUC requested, in 1992, the EC Commission to investigate the anti-competition agreement concluded by auto dealers in Europe to jointly boycott Japanese automobiles, arguing that said agreement was good for European auto makers, but not for the European consumers. The EC Commission held that BEUC's request was not in the interests of Europe, so it refused to investigate. The BEUC then appealed to the Court of Justice of the European Community. The Court of Justice of the European Community of first instance pointed out that the BEUC's request was good for safeguarding the consumers' interests and in the interests of the Europe at large. The EC Commission should make investigation.¹⁶ In China, the law does not give a consumers association the eligibility to sue on behalf of consumers. Under the relevant provisions of the Chinese law for the protection of consumers' rights and interests, one of the functions of a consumers association is to support injured consumer to sue against any act causing prejudice to their legitimate rights and interests.¹⁷ The law does not empower it to sue as a plaintiff.

2. Whether an industrial organisation is eligible to sue

Laws of some countries provide that an industrial organisation is eligible to bring antitrust suit as a plaintiff. For example, the German Law Against Restriction of Competition provides¹⁸ that an association for the promotion of industrial and commercial interest capable of exercising its rights may also have the right to claim for cessation of infringement if the association has many member businesses dealing in relevant or associated goods or services in the same market, has the human, material and financial resources required for them to perform the statutory function to pursue commercial or independent industrial interests, and the involved antitrust acts

have caused injury to the interests of their members. The law in China does not empower the corresponding industrial organisations to do so.

3. Whether a local government affected by monopolistic act is eligible to sue

Directed to some monopolistic acts, for example, a local government blockades a local market by putting up check-points or gives discriminate treatment, or excludes non-local products from fair competition by other means. Under this circumstance some scholars take the position that the local government of the domicile of the excluded businesses, as the representative of the local people, may be entitled to bring civil action for the local interests.¹⁹

The public interests are one of the interests protected under the Chinese Antitrust Law. The monopolistic act of local blockade undoubtedly does harm to the public interests. But the injured interests are mainly economic interests, and there are more direct victims, i.e. the excluded businesses that have interests at stake more directly in the monopolistic act. Therefore, it is proper for these businesses to sue in their own name. For this writer, a local government should be very cautious about involving itself in disputes over economic interests or matters on the ground of protecting the public interests.

The relevant issue is one of whether to bring civil public action involving civil antitrust matters. By the civil public action is meant a system under which a government agency or State department brings a civil public action involving a civil case on behalf of the State.²⁰ The U.S.A. is the only nation where a mechanism has been instituted for the nation to bring civil antitrust action. Scholars taking the position allowing civil public action in the antitrust field argue that, under Article 129 of the Constitution of China, the People's Procuratorate is the State supervision authority, so it is statutory and natural for it to bring civil public action. Besides, in the judicial practice, there are precedents where the Procuratorate brought civil action to protect State-owned property.²¹ For this writer, in the antitrust field, while a monopolistic act is prejudicial to the public interests, it often involves more specific victims, such as consumers and businesses. Besides, the Antitrust Law has set up the antitrust enforcement authority, and it is undue for China to off-handedly draw on the US-type system for civil public action. Moreover, the People's Procuratorate in China is a law supervision authority. Under Article 187 of the Civil Procedure Law, it is empowered to institute counterclaim directed to effective judgments made by the people's court. If the People's Procuratorate has the power to bring civil pub-

lic action, and, meanwhile, the power to institute counterclaim directed to effective judgments made by the people's court, it would result in its conflicting power and function and cause contradiction in logic.

IV. Ways of relief for group victims

As the preceding analysis shows, the representative action is legally groundless in China, and the civil public action is an issue worth further probing into; the difficulty of high price and costs will rest with lawsuit instituted by group victims in antitrust cases, and increase the burden of the people's court. Then how to make relief available to group victims? Some recommend that we draw on the US group litigation system. In litigation of the kind, one victim may sue on behalf of all having the similar experience, and the court determines that they constitute a group. Through a proper procedure of notice, so long as it is determined that no one in the group has expressly chosen to withdraw, they are all subject to the consequence of the group action. For this writer, the Chinese Civil Procedure Law expressly provides for the group litigation system. Article 55 of the Civil Procedure Law and Articles 61-64 of the Supreme People's Court's Opinions on Several Issues Relating to Application of the Civil Procedure Law of the People's Republic of China have set forth specific provisions concerning group litigation or action, which are very much workable, and would function well in other cases, such as IP cases. Accordingly, they are applicable to antitrust civil cases as well. ■

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⁸ Wu Gaosheng (ed.), *Explanantion of Antitrust Law of the People's Republic of China*, the China Publishign House of Legal System, 2007, P. 141.

⁹ Yuan Dingbo, Uncountable "Unexplainable Questions" in Civil Antitrust Lawsuit, the Legal Daily, 28 October 2008, P.6.

¹⁰ See Mark Whitener, Perspectives on Antitrust Litigation, carried in the Proceedings of the Symposium on Issues of Civil Antitrust Litigation prepared by the IP Tribunal of the Supreme People's Court, October 2008, in Tianjin

¹¹ In the Antitrust Law the competition-restrictive agreements between enterprises making products of the same class are referred to as cartel, such as price cartel, quantity cartel, and regional cartel.

¹² See Article 1 of the Unfair Competition Law of the People's Republic of China.

¹³ See Beijing Baian Corporation v. Beijing Zhihui Mingtang Commerce and Trade Co., Ltd., a case of dispute over unfair competition, in which the defendant published an advertisement reading "Regret right after buying computers now", and the plaintiff and the other 15 computer dealers claimed that the defendant's act constituted one of unfair competition. The first-instance court supported the plaintiff's claim, and the 16 cases were settled during the second-instance trial.

¹⁴ Lan Lei, Exercise of the Civil Litigation Right under the Antitrust Law Depending on Improvement of the Associated System, at www.competitionlaw.cn.

¹⁵ See *supra* note 14.

¹⁶ See Cases T - 37/92 BEUC et al. V. Commission (1994), ECR I—285.

¹⁷ Article 32, paragraph one (6) of the Law of the People's Republic of China for the Protection of Consumers Rights and Interests.

¹⁸ Article 33, paragraph two, of the German Law Against Competition Restriction, (2005).

¹⁹ Shi Jichun, Understanding and Application of the Antitrust Law, the China Publishing House of Legal System, 2007, P.310.

²⁰ See *supra* note 19.

²¹ See *supra* note 14.

¹ Shi Jianzhong, *Antitrust Law: Comments on laws and exploration of jurisdictional origin*, the China Renmin University Press, 2008, P.474.

² Article 1 of the Antitrust Law of the People's Republic of China

³ See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁵ Wang Lijun and Wang Haitao, A Study on Consumers' Rights and Interests under the Antitrust Law, the Jurisprudential Journal, 2007, Issue 3.

⁶ See *Supra* note 1, P.472.

⁷ See Phillip Areeda, Louis Kaplow, *Antitrust Analysis, Problems, Text, and Cases*, the CITIC Press, 2003, P.79.