
Unveil the Special Evidential Rules for Private Antitrust Litigations in China

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Admittedly, the evidential rules in specific jurisdiction, especially for the allocation of burden of proof, are of great vital for the ultimate result of the case trial. In view of the fact that private antitrust litigations are frequently featured with specificity, high-degree complexity and relative weakness of the plaintiffs, several special evidential rules have been instituted for private antitrust litigations in China. Meanwhile, private antitrust litigations still belong to the scope of civil litigations, hence are also applied to the evidence rules provided for the general civil litigations, except the articulated special rules.

In the following sections, the authors intend to address three key issues among others, that most frequently excite interests of multi-national firms, on the evidential rules for private antitrust litigations in China, including the burden of proof, evidence format and quasi discovery rules. Hopefully the presentation and illustration could provide valuable insights for the readers.

Burden of Proof

Generally speaking, the burden of proof is borne by the claimants for general civil procedures. While for private antitrust litigations, special rules for burden of proof are designed for various causes of actions, given that the “who claim who produce the evidence” principle in a number of cases places the plaintiffs in such a difficult situation that they cannot produce sufficient evidences to support their claims. Things have been followed in the early days since the enforcement of the Anti-Monopoly Law (“AML”) are that the plaintiffs are seldom the winning party.

Under the above-mentioned backdrop, the Supreme People’s Court of PRC issued a judicial interpretation on private antitrust litigations in 2012 (the “Antitrust Judicial Interpretation”), in which differentiated burdens of proof are allocated to different alleged monopolistic behaviors.

Specifically, for horizontal monopolistic agreements with specific forms of behaviors, the special rule here is that the burden of proof on “there is no effect of eliminating or restricting competition from concerning agreement” is borne by the defendant instead of the plaintiff. Specific forms of behaviors include fixing prices, restricting the sales or production volume, allocating the sales or procurement market, restricting the purchase of new technology or equipment, or development of new technology or product, and collective boycott. In spite of this special rule, the plaintiff still bears the burden of proof on the market definition and existence of relevant horizontal monopolistic agreement. Where it is a tort dispute, the plaintiff also needs to prove the damages and the causal links between concerning horizontal monopolistic agreement and its damages.

The Antitrust Judicial Interpretation does not stipulate special rules on burden of proof for vertical monopolistic agreements, probably because vertical agreements in many cases produce net pro-competitive effects. That being said, the general rules for civil procedures should be followed for cases related to vertical monopolistic agreements. In such occasions, the plaintiff is obliged not only to prove the market definition, existence of behavior, damages and the causal link between damages and the behavior for tort disputes, but also to prove that concerning agreement does produce effects of eliminating or restricting competition. For example, in the *Rainbow v. Johnson & Johnson* case, the Shanghai High People's Court clearly articulated that the plaintiff Rainbow bears the burden to prove that relevant vertical agreement has effects of excluding or restricting competition.

In regard to allegation of the abuse of market dominance, the Antitrust Judicial Interpretation provides that the plaintiffs bear the burden to prove that the defendant possesses a dominant position in the relevant market and carried out specific abusive behavior. Where the defendants allege with justifiable reasons, they bear the burden of proof accordingly. Two special rules are worth of mentioning in this light. First, information publicized by the defendant could be referred to as the evidence to prove the market dominance by the plaintiff, such as information posted in the defendant's official website, information in the defendant's annual report, publicized interview of the defendant's senior management, etc. Second, for public utility companies or companies possessing an exclusive position in the relevant market pursuant to Chinese laws, the court may directly found the market dominance based on specific situations on market structure and market competition, which is nevertheless rebuttable.

Evidence Format

There are eight types of evidence format pursuant to the Civil Procedural Law of PRC: (1) statements of the parties; (2) documentary evidence; (3) physical evidence; (4) audio and visual material; (5) digital data; (6) testimony of witnesses; (7) appraisal opinions; (8) transcripts of inspection and examination.

In consideration of the specificity and high-degree complexity, a high-frequency evidence format in private antitrust litigations is the expert opinion. The Antitrust Judicial Interpretation points out in one provision, "The parties may apply to the court, for one to two persons with special knowledge to be appeared in the court, for the purpose of explaining on special issues related to the proceeding". In practice, persons with special knowledge have been invited to the court in a number of private antitrust litigation cases. For instance, in the *Qihoo v. Tencent* case, the *Rainbow v. Johnson & Johnson* case, the *Yunnan YingDing v. Sinopec* case, the *Rijing v. Panasonic* case and rare-earth case, the parties have applied economic or technical experts to be appeared in the court and provided expert opinions on various issues, such as the substitutability analysis, the analysis of market dominance, the pro-competitive and anti-competitive effects, etc.

In early years after the issue of the Antitrust Judicial Interpretation, people sometimes disputed over the nature of the expert opinion. Some people tend to view it as a type of witness testimony, while some think it is more appropriate to view it as the appraisal opinion. However, in the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law ("Interpretation of Civil Procedure Law"), it has been clarified that the opinions of persons with special knowledge should be deemed as the parties' statement in nature.

Quasi Discovery

Actually there is not a US or UK-type discovery procedure as such in China but the court may, of its own motion or upon request from the parties, organize an evidence exchange before trial. The court may also, of its own motion or upon request from one of the parties, order a company or an individual to produce a certain document.

To be specific, Article 112 of Interpretation of Civil Procedure Law provides, "Where a piece of documentary evidence is under the control of the other party, the party bearing the burden of proof may, prior to the expiration of the time period for producing evidence, apply to the competent court in writing to order the other party to submit the said evidence. Where the reasons for the application are established, the court shall make such order, and the expenses so incurred shall be borne by the applicant. Where the other party refuses to submit without justified reasons, the court could determine that content of concerning documentary evidence alleged by the applicant is true."

This provision may be advantages to the plaintiffs in a large degree, especially where it is hard for the plaintiff to collect evidence by itself. For example, in some follow-up private litigations, the plaintiff often only knows the existence of monopolistic behavior, while the material evidence is under the control of the defendant. In such cases, the plaintiffs may submit a written application to the court pursuant to the above rules.

Concerning the court order to produce documents, what is the standard that the applicant must meet to define the documents that must be disclosed? Generally speaking, the following requirements should be met where the party applies the court to order to produce documents: (a) the applying party is unable to collect the document; (b) the document is under the control of the other party; (c) the document is specific; (d) the document is closely related to the case.

In addition, the application shall clearly specify the basic details of the evidence concerned, such as the name of the person or entity to be investigated, his or its address, the nature of the evidence to be investigated and collected, the reason the evidence needs to be investigated and collected by the people's court, and the facts in support of which the evidence is sought. According to our experience, the documents also need to be defined very specifically. Information such as the name, the content and the time of occurrence of such documents, if any, should usually be

defined for the application for a disclosure order.

In the end, it should be recognized that the above sections only introduced three key issues among many, on the evidential rules of China's private antitrust litigations. In summary, with several special evidence rules installed since 2012, it has witnessed that the plaintiffs in private antitrust litigations started to win in the cases, although the proportion is still low. Looking forward, more concrete evidential rules and good judicial practice for private antitrust litigations are eagerly expected, and the authors will also closely observe and share our insights.