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RESEARCH ARTICLE

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Comments on the Anti-Monopoly Law of the People's Republic of China

Abstract The Anti-Monopoly Law of the People's Republic of China has provided to prohibit monopoly agreements and abuse of dominant market position, control concentration of business operators and fight against administrative monopoly. The transformation of China's economic system is incomplete, and the Anti-Monopoly Law has many flaws. At the initial stage of enforcing the Anti-Monopoly Law, severe challenges will occur in legislative purposes, enforcement authorities, fighting against administrative monopoly and handling of the relationship between anti-monopoly enforcement and industry supervision. Thus, the promulgation of the Anti-Monopoly Law is only the first step in the legislation on anti-monopoly.

Keywords Anti-Monopoly Law, monopoly agreement, abuse of dominant market position, concentration of operators, administrative monopoly, industry regulation

摘要 中国反垄断法规定了禁止垄断协议、禁止滥用市场支配地位、控制经营者集中、反对行政垄断等制度。中国经济体制转型尚未彻底完成，反垄断法也存在很多不足，反垄断执法初期在立法目的、执法机关、反对行政垄断、处理反垄断执法与行业监管的关系方面会遇到严峻挑战。因此，颁布反垄断法只是反垄断立法的第一步。

关键词 反垄断法，垄断协议，滥用市场支配地位，经营者集中，行政垄断，行业监管

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On August 30, 2007, the Anti-Monopoly Law of the People's Republic of China ("Anti-Monopoly Law") was adopted at the 29th meeting of the 10th NPC Standing Committee. The promulgation of the Anti-Monopoly Law is a major event in Chinese legal system, which is of great significance to the establishment of the legal system of Chinese socialist market economy; and in Chinese economic system, it is a milestone in the economic reform. Anti-monopoly law is a legal system unique in market economy, marking that the basis of national resource allocation and economic development is market mechanism and competition mechanism, and thus, the promulgation of China's Anti-Monopoly Law may strongly declare that China has basically established the socialist market economy mechanism. The anti-monopoly law will be of important influence on the national economy and almost all the economic sectors as well as the actions of enterprises and consumers, which is the basic law regulating the national economic order and market order. According to Article 57, the Anti-Monopoly Law became effective on August 1, 2008. However, the transformation of Chinese economic system is incomplete. Furthermore, the Anti-Monopoly Law still remains to be improved, and hence the enforcement of China's Anti-Monopoly Law faces many challenges at the initial stage.

1 Analysis and comment on the substantive law system of China's Anti-Monopoly Law

According to the economic principle of anti-monopoly law, if the market share of an enterprise is too large, the product prices tend to increase with the reduction of market supply. Consequently, the task of anti-monopoly law is to prevent and suppress monopoly in the market and in the circumstance of existing lawful monopoly, supervise monopoly enterprises in order to prevent the abuse of dominant market. Therefore, China's Anti-Monopoly Law has provided for the following substantive law systems.

1.1 Prohibition of monopoly agreements

The monopoly agreement refers to the agreement, written or oral, reached by business operators for the purpose of expelling and restricting competition, or for producing such effects. By learning from the practices of the US antitrust law, EC competition law and German law against the restraint on competition, the monopoly agreements in China's Anti-Monopoly Law are divided into horizontal agreements and vertical agreements.

1.1.1 Horizontal monopoly agreements

Horizontal monopoly agreements mean those on the restriction of competition between competitors, generally refer to as cartel. Vertical agreements are those reached by business operators of different production or at different business stages, the parties thereto are in a relationship of economic complementation with the restriction by manufacturers against sellers, or vice versa.

As once stated by Adam Smith, the manufacturers of similar products rarely gathered together, and, if they did so, the purpose would be to discuss how to deal with consumers. For common economic interest, the competitors tend to restrict competition by conspiracy or collusion. In this regard, Article 13 of China's Anti-Monopoly Law prescribes that business operators in the relationship of competition shall not reach any of the following monopoly agreements: (1) Fix or change prices of products; (2) limit the output or sales of products; (3) divide sales markets or markets for purchase of raw materials; (4) limit the purchase of new technology or equipment or the development of new technology or new products; (5) jointly boycott transactions; (6) other monopoly agreements determined by the anti-monopoly enforcement authority of the State Council. Then Item (6) is obviously a catch-all clause, the purpose of which is to endow the anti-monopoly enforcement authority with discretion and the right to prevent some agreements of severe restriction on competition not explicitly specified herein.

Among the aforesaid monopoly agreements, the agreements on price fixing, restriction of quantity and division of market impose very serious injuries on market competition with no benefit to consumers, which are called "Hard Core Cartel" or "Malicious Cartel" subject to the per se illegality rule. Regardless of the circumstance or the members of Cartel, they are all regarded as the violation of law. If a cartel applies the per se rule, there will be two influences in the case: (1) The plaintiff can win the case only by proving the existence of the cartel but with no need to prove the anti-competitive effect of the cartel; (2) the hearing agency may find the illegality of a cartel with no need to investigate on the purpose and consequence of the cartel, hence saving time and expense for the hearing of cases. (Denis, 1991) There are many internationally well-known cases concerning cartel, such as the decision on the price cartel in Trenton Potteries by the US Supreme Court, as stated by the defendant, the fixed price was reasonable because the purpose was to prevent the "destructive price war" between competitors. The defendant also questioned: If the price fixing was based on the normal profits of enterprises, could it be said that the price was reasonable? As held by the court, whether a price was reasonable should be judged by market competition. If the market competition was restricted, it could be judged that the price was unreasonable. The court also stated that there were no other standards

to judge whether the price fixing was reasonable except for competition. "The reasonable price fixed today may become the unreasonable price of tomorrow for economic and business changes", and what's more, "only market competition can effectively protect consumers from the bitterness of monopoly and price manipulation."[1] (Howard, 1991)

Horizontal agreement is a broad concept. According to Paragraph 2 of Article 13 of China's Anti-Monopoly Law, besides written and oral agreements, horizontal agreements also include any decision made by enterprise groups or trade associations or other concerted practices among competitors that eliminate or restrict competition. Considering the possible adverse effects that may come from trade associations on market competition and especially the possibility of concerted prices, Article 16 the Anti-Monopoly Law stresses that trade associations shall not organize business operators in the relevant industry to engage in any monopoly acts prohibited under Chapter 3 concerning monopoly agreements. Article 16 was added during the 3rd review by the NPC Standing Committee on the draft Anti-Monopoly Law, when media reported that Chinese branch of International Ramen Manufactures Association was organizing, planning and coordinating the uniform prices in the rise. Members of the NPC Standing Committee held that such acts of trade associations severely impaired the interests of consumers and unanimously requested the Anti-Monopoly Law to make prohibitive provisions on the acts of trade associations that restrain competition. The concerted practices refer to in Paragraph 2 of Article 13 of the Anti-Monopoly Law consist of two factual elements: (1) One is consensus, i.e., concerted acts by two or more business operators, such as the increase of product price or the increase of price at the same rate; (2) the other is cooperation, i.e., cooperation among business operators. If several business operators have concerted practices without mutual cooperation, the concerted practices may not be deemed as unlawful.

1.1.2 Vertical monopoly agreements

Article 14 of the Anti-Monopoly Law provides for the prohibition of any of the following monopoly agreements by or between the operator and trading counterparts: (1) Fixing the resale prices of products to a third party; (2) limiting the minimum resale prices of products to a third party; (3) other monopoly agreements determined by the anti-monopoly enforcement authority of the State Council. The aforesaid Item (3) is also a catch-all clause, whose purpose is to endow the anti-monopoly enforcement authority some discretion. Those agreements are between sellers and buyers, called vertical agreements.

[1] 273 U. S. 392, quoted from Marshall C Howard, 78.

With respect to vertical agreements, the Anti-Monopoly Law merely prohibits the agreements on resale price fixing and limiting the minimum resale price, which indicates that, compared with horizontal agreements, China's Anti-Monopoly Law has adopted a relatively lenient attitude toward vertical agreements. The different attitudes adopted by the Anti-Monopoly Law toward horizontal and vertical agreements resulting from the nature of such agreements. Horizontal agreements are between competitors, the nature of which is to restrain competition, while vertical agreements are not between competitors, whose purpose is generally not to restrain the quantity or the increase of prices but the increase of output and expanded sales, so as to universally expand for social wealth. On the other hand, the degrees of the impacts of horizontal restraints and vertical restraints also differ on market competition. Taking the division of sales markets for example, the regional division of competitors (i.e., regional cartel) may enable the cartel to be a monopolist within its own spheres of influence, the result of which is to eliminate and restrain the possibility for consumers to select goods or service. However, with respect to vertical regional division, as long as manufacturers have not acquired a dominant market position, brand competition will exist in divided regions. Furthermore, in the situation of vertical regional division, sellers have the exclusive rights for sale within respective regions, and hence they will spare no effort to promote sales of goods, which will lead to expansion of production. That is to say, vertical restraints include agreements on exclusive sale, exclusive purchase, franchised sale and franchised operation. Such agreements may, on the one hand, restrain the competition among sellers, and on the other hand, reduce the possibility of free-riding, strengthen sales network and promote brand competition.

The Anti-Monopoly Law prohibits manufacturers and sellers from signing agreements on resale price fixing to a third party and prohibits manufactures from restraining sellers on the minimum resale price of goods to a third party because those agreements may ultimately increase the prices of goods. While in the circumstances without the restraint of vertical prices, there exists price competition among sellers of the same brand, and consequently, consumers may purchase relatively cheaper commodities. Once manufacturers fix the sale prices for sellers or restrain their minimum sale prices, the result is that the price cartel will be established between sellers, which may severely impair market competition and the interests of consumers. In the current economic life of China, resale price fixing or restraining of the minimum resale price is usually the restriction by manufacturers against sellers. Thus, the provision of Article 14 of the Anti-Monopoly Law will be of significant influence on the production and business of Chinese enterprises.

Up to now, however, there still exists a big controversy over whether the vertical agreement on price fixing is unlawful per se. Nine judges from the US

Supreme Court in Leegin Creative Leather Products, Inc. v. PSKS, Inc. of June 28, 2007 overruled the per se rule applied to the agreements on resale price fixing for nearly one hundred years by 5:4.[2] The judgment pointed out that, the agreement on resale price fixing could stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing competition among retailers selling the same brand, and thus the reasonable rule shall apply to other vertical restraints. There are no explicit provisions in China's Anti-Monopoly Law on the per se rule, and it may be taken that the reasonable rule applies to Article 14 therein. With respect to vertical agreements, there exists another issue that if one party to the agreement acquires the dominant position of the market, the vertical restraints may be indicated as abuse of the dominant market position, such as unreasonable tied sale. In such case, it is necessary to conduct an analysis in accordance with the provisions of the Anti-Monopoly Law on prohibiting the abuse of dominant market position.

1.1.3 Exemption of monopoly agreements

Though competition is the best way of resource allocation, in some market conditions, optimal resource allocation can be realized only in the restraints on competition. Hence, Article 15 of China's Anti-Monopoly Law provides that where business operators reach agreements in the following circumstances, they can exempt from the prohibitive provisions of Articles 13 and 14: (1) To improve technology or research and develop new products; (2) to upgrade product quality, reduce cost, improve efficiency, unify product specifications and standards or realize professional labor division; (3) to improve operational efficiency and enhance competitiveness of small and medium-sized business operators; (4) to serve social public interests including energy conservation, environmental protection and disaster relief; (5) to mitigate severe decrease of sales or excessive surplus of production due to economic recession; (6) to safeguard the legitimate interests in foreign trade and foreign economic cooperation; (7) other circumstances prescribed by law and the State Council.

Most of the aforesaid agreements are conducive to improving the economic efficiency of enterprises. For example, the cooperation among competitors in R&D on new products or new technology may not only reduce repetitive investment and cost but also assemble wisdom, practice, capital and technology of related enterprises, compared with R&D activities of individual enterprises, which may develop new products and new technology more quickly. The specialization agreements among enterprises are conducive to realizing production specialization and rationalization of business operations by

[2] See Syllabus, US Supreme Court, http://www.law.cornell.edu/supect/html/06-480.ZS.html.

enterprises, which may improve economy of scale, lower costs and increase benefits. The standard agreements among enterprises are generally uniformed requirements in performance, specifications, quality and grades of raw materials, semi-finished products or finished products. Though such agreements may restrict competition, they can improve the substitutability and compatibility of products, hence conducive to promoting the quality competition among products of the same category. The cooperative agreements among SMEs mainly refer to their cooperation in production, R&D, financing, management, advertising, procurement and sale for the purpose of improving economic efficiency so as to realize the reasonableness of economy and improve the competitiveness of enterprises.

Among the agreements on the restraint of competition that may be exempted, a big controversy exists on the restraint of competition, being agreed due to economic recession or for the purpose of mitigating the severe decrease of sales. It is worried that such provision will give green lights to many cartels that severely impair on competition. In fact, such provision in the German law against the restraints on competition has almost not been used. In theory, economic recession is a kind of commercial risk, in which the market competition adjusts the market structure and the product structure, and thus, market economy may not generally exempt such kind of cartels. China's Anti-Monopoly Law provides that this sort of cartels may be but are not definitely exempted, because in accordance with Paragraph 2 of Article 15 thereof, in the circumstances of above Items (1)~(5), the parties involved shall prove not only that the agreements at their request for exemption may not severely restrain competition, but also that consumers can share the interests thereof. That is to say, the agreements of severe restraints on competition and especially those exclusion of competition may not be expected to be exempted from China's Anti-Monopoly Law.

There still exists a big controversy in Article 15 over the cartels "to safeguard the legitimate interests in foreign trade and foreign economic cooperation", which mainly refer to export cartels. China's Anti-Monopoly Law exempts export cartels partially based on jurisprudential theories because such kind of cartels are of no impact on the competition of domestic market, and partially based on practices because foreign enterprises often file anti-dumping lawsuits against Chinese export products and consequently it is necessary for Chinese export enterprises to adjust export prices so as to avoid excessively low export prices. In addition, other countries also have the provisions on the exemption of export cartels, such as the US Export Trading Company Act of 1982. However, there is an undisputable fact that though the exemption of export cartels is a sovereign act of a country, in the situation where the anti-monopoly laws of other countries and China's Anti-Monopoly Law are similarly of an extraterritorial

effect,[3] China's Anti-Monopoly Law on the exemption of export cartels is of no help to Chinese export enterprises. Chinese export enterprises have encountered many anti-monopoly lawsuits lodged from abroad. For example, Chinese enterprises that produce Vitamin C suffered from an antitrust lawsuit in the US and were charged with jointly manipulating the price and quantity of Vitamin C exported to the US and other regions since December 2001. (Mei, 2005)

China's Anti-Monopoly Law does not prescribe the way of exemption of monopoly agreements. The draft submitted by the Ministry of Commerce to the Legal Affairs Office of the State Council in 2004 provided that the parties involved shall file an application to the anti-monopoly enforcement authority for exemption and specified the documents that should be submitted for declaration. In the draft for solicitation of comments released in July 2005 by the Legal Affairs Office of the State Council, the provision on declaration for exemption was changed to voluntary declaration by the parties involved,[4] which indicated that Chinese legislators had once considered learning from the practices of EC law and German law. However, since the exemption declaration will bring forth over workload to the anti-monopoly enforcement authority and even make it have no time in handling major and serious cases concerning the restraints on competition, China's Anti-Monopoly Law refers to the mode of exemption by law as prescribed in the US Antitrust Law, i.e., as long as a monopoly agreement conforms to Article 15 of the Anti-Monopoly Law, it will be automatically exempted. Of course, such practice also brings uncertain risks to enterprises because they may regard the cartels as breaching law and those not be exempted as lawful behaviors, which may finally be sanctioned by the Anti-Monopoly Law.[5] In order to make China's Anti-Monopoly Law operable and offer necessary guidance to enterprises to predict the consequences of their behaviors, China shall learn from the practice of EC law to formulate implementation rules or issue guidelines on the exemption of horizontal and vertical agreements.

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[3] See Article 2 of the Anti-Monopoly Law of China.

[4] Article 13 of the Draft Anti-Monopoly Law (July 2005) provided that business operators may conduct the agreement declaration at the competent ant-monopoly authority. The competent anti-monopoly authority shall make the decision whether the agreement is prohibited within 30 working days upon receipt of the declaration, and if no decision has been made beyond the time limit, the agreement will be deemed as not prohibited. If the competent anti-monopoly authority makes the decision not to prohibit the agreement, it may attach restrictive conditions to the agreement.

[5] Article 15 of the Anti-Monopoly Law also exempts the cartels in social public interests or for economic recession, and it is not an easy task for enterprises or their legal advisors to judge whether such cartels can be exempted.

1.2 Prohibition of the abuse of dominant market position

The second pillar of the Anti-Monopoly Law is the prohibition of abuse of dominant market positions. The Anti-Monopoly Law merely prohibits the abuse of dominant market positions rather than itself since the acquisition of the dominant market position is lawful. For example, dominant market positions or monopoly positions of utility enterprises offering service including electricity, telecommunication, railway, postal and tapped water to the society are generally authorized by the government. The dominant market positions of some enterprises are based on innovation, foresight and sagacity, such as Microsoft developing into a global big-brand enterprise by its intellectual property right, hence taking the dominant position in the software market of the world. Since all the countries generally encourage enterprises to make innovations and inventions, many countries have also formulated special legal systems, such as patent law and copyright law for the protection of intellectual property rights and anti-monopoly laws will not condemn enterprises for acquisition of dominant market positions based on their own economic efficiency or intellectual property rights. However, since the enterprises taking dominant market positions is only restricted to a limited extent or not restricted by competition, they may abuse market powers to eliminate and restrain competition to harm the interests of consumers. Consequently, Chapter III of China's Anti-Monopoly Law makes prohibitive provisions on abuse of dominant market positions, and its legal issues are as follows: (1) Definition of the relevant market; (2) determination of the dominant market position; and (3) determination of the abuse of dominant market position.

1.2.1 Definition of the relevant market

To determine whether an enterprise takes a dominant market position or not, it shall be considered in what market the enterprise conducts business and who are its competitors. The Anti-Monopoly Law calls such market the "relevant market". Paragraph 2 of Article 12 of China's Anti-Monopoly Law prescribes that "The relevant market refers to the scope of products and areas within which the business operators compete against each other with respect to specific commodities or services within a given period", which shows that the definition of relevant market requires for considering three factors, i.e., (1) relevant products; (2) relevant regions and (3) relevant time. In practice, the main factors in defining the relevant market are relevant products and relevant regions. The Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law pointed out:

> "The objective of defining market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of an effective competitive pressure. It is from this perspective, that the market definition makes it possible, inter alia, to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 81."[6]

The relevant product market refers to all the products (incl. the services) of mutual substitutability in the eye of consumers according to features, prices and uses. Such substitutability of demand is the most direct and effective constraining force for the suppliers of specific products. In definition of the relevant product market, the potential competition in the market should be considered apart from the demand substitutability of specific products, which means that, when specific products show small but significant non-transitory increase in price, consumers regard them as other products of substitutability. The US Department of Justice, the Federal Trade Commission and the Commission of the European Community generally set the degree of such non-transitory increase in price at 5%~10%, which means consumers may choose other substitutes when such degree of increase in price occurs in specific products.

The relevant geographic market refers to the geographic scope where the related substitutable products are operated. That is to say, in such geographic scope, the conditions for competition of the relevant products are uniform, and such relevant geographic market is distinguishable from other geographic markets in face of different competitive conditions. In accordance with the actual circumstances of a case, the anti-monopoly enforcement authority may regard a local market as the relevant geographic market or the whole domestic market as the relevant geographic market. In international anti-monopoly cases, the anti-monopoly enforcement authority may also regard the world market as the relevant geographic market, such as the cases involved in cross-border M&A or where Microsoft was suspected of the abuse of dominant market position.

1.2.2 Determination of the dominant market position

In accordance with Paragraph 2 of Article 17 of the Anti-Monopoly Law, dominant market position refers to the market position by a business operator that can control the price or the quantity of products or other trade conditions in

[6] The Commission Notice on the Definitions of the Relevant Market for the Purpose of Community Competition Law, [1997] OJC 372.

the relevant market or able to block or affect the entry of other business operators to the relevant market, which indicates that the dominant market position is an economic phenomenon, reflecting the relationships between enterprises and competitors or trading counterparts (incl. consumers) as well as between enterprises and market competition. That is to say, enterprises possessing the dominant market position, under no pressure of competition, may freely set prices or make other business decisions without considering competitors or trading counterparts.

To make operable the concept of "dominant market position", Article 18 of the Anti-Monopoly Law put forward a series of factors for identification: (1) The market share of business operators and the competitive status of relevant market; (2) the ability of business operators to control the market; (3) the financial capability and technical conditions of business operators; (4) the reliance of other business operators in the deal; (5) the difficulty for other business operators to enter the relevant market; (6) other factors relating to the determination of dominant market position. For the purpose of promoting the legal stability and the predictability of the parties involved, Article 19 of the Anti-Monopoly Law learns from the practice of German law against the restraint on competition, and put forth the situations (as below) for presumption of dominant market position: (1) The market share of a business operator in the relevant market reaches 1/2 or more; (2) the combined market share of two business operators in the relevant market reaches 2/3 or more; (3) the combined market share of three business operators in the relevant market reaches 3/4 or more.[7] However, Paragraph 3 of Article 19 provides that a business operator shall have the right to rebut the presumption of dominant market position, which indicates that the three presumptions are ineffective as statutory presumption in civil law, or rather, Article 19 of the Anti-Monopoly Law only functions as a signal, namely, reminding the parties involved and the anti-monopoly enforcement authority of possible dominant market position in certain situations. The parties involved may have many reasons to overthrow the presumption of dominant market positions, such as, there is substantial competition between business operators, or its market share is insufficient to prove his dominant market power due to technical conditions or because of potential competitors.

The concept of "dominant market position" in China's Anti-Monopoly Law refers to the provisions of German law and EC law. The US antitrust law generally uses the concepts of "monopoly power" and "market power". Monopoly power is generally taken as the ability of an enterprise in the relevant

[7] Paragraph 2 provides that under the circumstances of Items (2) and (3), a business operator shall not be presumed to possess the dominant market position if its market share is less than 1/10.

market to "control price or eliminate competition",[8] which is consistent with the concept of "dominant market position" in China's Anti-Monopoly Law.

1.2.3 Behaviors of the abuse of dominant market position

In accordance with Article 17 of China's Anti-Monopoly Law, the behaviors of abusing the dominant market position include: (1) Selling products at unfairly high prices or purchasing products at very low prices; (2) selling products at price below the cost with inappropriate reasons; (3) refusing to trade with counterparts with inappropriate reasons; (4) limiting counterparts to trade only with itself or its designated business operators with inappropriate reasons; (5) selling tied products or imposing other unreasonable conditions in the deal with inappropriate reasons; (6) applying differential trade treatments to the counterparts as of price in the same condition; (7) other abuses of dominant market positions decided by the anti-monopoly enforcement authority. Those behaviors of abuse can be divided into two categories, i.e., (1) exploitative abuse or behaviors of unfair price, and (2) obstructive abuse, namely, unlawful elimination of competition.

There are different viewpoints for the countries all over the world on whether anti-monopoly laws should supervise the price behaviors of monopoly enterprises. The US courts deem that monopoly enterprises claiming monopoly prices is not against the antitrust law. In the judgment of Trinko case in 2004, the US Supreme Court pointed out that it did not go against law for monopoly enterprises to claim for monopoly price, and furthermore, it was an important embodiment of free market economy, for obtaining monopoly profits, at least within a short period, is the largest incentive for enterprises getting to take the risk of conducting innovation and expansion of business at discretion.[9] Different from the US law, Article 82(a) of the EC Treaty explicitly prescribed that "directly or indirectly imposing unfair purchase or selling prices or other unfair trade conditions" is an abuse of the dominant market position. In United Brands of 1978, the European Commission found that there existed as "excessive price" when United Brands Company sold its Chiquitas brand of bananas in the three markets of Germany, Denmark and Benelux. However, the Court of Justice quashed the Commission's decision on exploitative abuse for lack of investigation on the cost of bananas sold by United Brands Company. At present, though the EC Treaty has the provisions as aforesaid, the EC Commission and the Court of Justice seldom carry out price regulation on monopoly enterprises

[8] Concord Boat Corp. v. Brunswick Corp., 207 F. 3d 1039, 1060 (8th Cir. 2000); Intergraph Corp. v. Intel Corp., 195 F. 3d 1346, 1353 (Fed. Cir. 1999).
[9] Verizon Communication Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U. S. 398 (2004).

except for those enterprises engaged in natural monopoly or authorized monopoly operation because they are actually under the price regulation by the governments. (Jones, Sufrin, 2004) In the legislation of China's Anti-Monopoly Law, some scholars put forth that price supervision is a tough task for the anti-monopoly enforcement authority. However, people hate the one-sided unfair clause of monopoly enterprises, especially the unreasonable increase of price by monopoly enterprises, and thus the prohibition of exploitative abuse has become the most welcome provisions in China's Anti-Monopoly Law. Nevertheless, only when impediments exist in law or for enterprises to enter the market in fact can the government regulation on product prices be reasonable.

The obstructive abuses prohibited by the Anti-Monopoly Law are in essence exclusive behaviors. Different from general exclusive behaviors in contract, the abusive exclusions at least meet the constitutive requirements: (1) The actor takes the dominant position in the market; (2) the behavior severely impairs competition and even eliminates competition; and (3) the elimination is unjust or unreasonable. Moreover, the third condition is the most difficult to identify since it requires not only legal knowledge but also related knowledge in economics or techniques. For example, people have different opinions on the bundled transactions of the Microsoft Corporation. Some people hold that since Windows and Internet browsers are products of Microsoft, Microsoft has the right to sell them in its own way and ask PC manufacturers to sell products according to its requirements. However, in view of the competition law, the bundled transactions of Microsoft is unjust since it takes the monopoly position in the market of computer operating system, and such kind of bundled sales may involve the downstream markets into its own sphere through the network effect and the role of similar leverage, hence impairing the innovative activities of other enterprises chronically and unfairly. The compulsory licensing of the intellectual property rights of Microsoft, therefore, is not to limit the development and innovation of Microsoft, but provide other enterprises with the possibility for participation in competition and innovation.

The tied sales indicates that though the enterprises of dominant market positions may, in principle, participate in economic deals like other enterprises and have the right to sign contracts according to the principle of free contract, the freedom of contract is abused and their acts should be prohibited if market competition is restricted by their monopoly positions. It means that competition is the prerequisite of contract freedom. Some transactions are lawful in the competitive market, but they will lose legality in monopoly market. Article 55 of China's Anti-Monopoly Law also provides that "This Law is applicable to the undertakings which abuse intellectual property rights and eliminate or restrict market competition." It shows that in China's Anti-Monopoly Law, the intellectual property rights are general property rights, which is not exempted

from the Anti-Monopoly Law, and especially the abuse of intellectual property rights can not be exempted from the Anti-Monopoly Law. The provision of China's Anti-Monopoly Law on intellectual property rights is very important, partly because intellectual property rights are of special significance in market competition and partly because China is an importer of intellectual property rights at present, and thus, the effective prevention and prohibition of the abuse by the holders of the intellectual property rights by legal means is of important significance for safeguarding the interests of Chinese enterprises and promoting the economic development of China. As Article 55 is a general provision merely, Chinese legislators should formulate relevant guidelines or implementing rules thereon.

1.3 Control on the concentration of business operators

The third pillar of China's Anti-Monopoly Law is to control concentration. The "concentration of business operators" refers to the concept of "Concentration between Undertakings" in the EC competition law. The anti-monopoly laws of the US and many other countries do not use the term "concentration" but the term "business M&A", namely, Merger & Acquisition. Even in the European Community, people generally call "Concentration between Undertakings" as business Merger & Acquisition. For example, the Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings is abbreviated as the Merger Regulation.

According to mutual economic links of the participating undertakings of combinations, people divide the combinations of undertakings into horizontal combination, vertical combination and mixed combination. The horizontal combination is the combination of competitors, and the vertical combination is the combination of upstream and downstream enterprises, i.e., there exists the buy and sell relationship in the business activities. The mixed combination refers to the combination among enterprises without mutual relationship, such as the combination of a steel & iron enterprise with a textile enterprise. The anti-monopoly law mainly focuses on horizontal combination since it may obviously reduce or even eliminate competitors. The 1992 Horizontal Merger Guidelines issued by the US Department of Justice and the Federal Trade Commission pointed out that the acquisition of an enterprise or the combination of two enterprises does not constitute a restraint on competition itself, but in certain market conditions, if the combination may expand the market power of enterprises and increase the possibility for an enterprise to abuse the market advantage, it will affect market competition. Horizontal combination has an influence on market competition in two respects: (1) Excessive combination may promote the coordination among enterprises, and (2) excessive combination may

promote unilateral restraint on competition of an enterprise, especially the capability for increase of price. Therefore, the control of horizontal combination among enterprises is the basic content of anti-monopoly laws. In this regard, several issues are discussed as below.

1.3.1 Determination of concentration of business operators

According to Article 20 of the Anti-Monopoly Law, the concentration of business operators refers to affecting the structure of market competition: (1) Combination of business operators, including combination by new established and assimilated combination in the company law; (2) acquisition of control of other undertakings through acquisition of equity or assets; or (3) acquisition of control of other undertakings or capability for imposing decisive effect on other undertakings by contracts or other means. "Other means" are mainly personnel combination, where the management personnel of one enterprise belong to another enterprise. In such case, both enterprises become a combination in market competition just like equity participation in mutual aspects. Many anti-monopoly laws explicitly prohibit personnel combination between large enterprises, such as Section 8 of the Clayton Act.

In the concentration of business operators, acquisition of equity is the most important. However, if an enterprise obtains only 10% shares of another, it is hard to say that it has acquired the control over the other enterprise. But if an enterprise acquires 50% or more, it is simple to say that it has acquired the control power over the other. In market economic conditions, an enterprise generally does not need to acquire 50% or more to control other enterprise, for the shares of the other may be dispersed in many shareholders. Thus, in terms of obtaining the right of control via acquisition of shares, a legal quantitative test is needed. For example, German law against restraints on competition provides that if an enterprise acquires 25% voting shares of another, it may be determined that both enterprises are in the combination.

1.3.2 Filing criteria on concentration

According to Article 21 of the Anti-Monopoly Law, if a concentration reaches the filing threshold prescribed by the State Council, prior filing should be made otherwise no concentration may be reached. As prescribed by Article 22 of the Anti-Monopoly Law, no filing shall be made to the anti-monopoly enforcement authority of the State Council if the concentration falls into any of the circumstances: (1) One undertaking involved in the concentration owns more than 50% of voting shares or assets of any of other undertakings; or (2) more than 50% of voting shares or assets of each undertaking involved in the

concentration are owned by the same undertaking not involved in the concentration. Since the objective for control of concentration is to prevent excessive concentration of the market and in the circumstances specified in Article 22, the business operators who participate in the concentration have become one body in market competition, i.e., the concentration is actually the internal merger and acquisition of one enterprise group or Konzern, which may not affect market competition.

Article 21 of the Anti-Monopoly Law requires that filing shall be made by the enterprise up to the criteria, but no specific criteria has been made for filing, because the members of the Standing Committee have too much controversy for the review over the filing criteria specified in the Draft Anti-Monopoly Law provided by the Legal Affairs Office of the State Council in 2006. Article 17 in the Draft provided that if in the previous year the sales amount of the business operators who participated in the concentration of the globe exceeds RMB12b, and the sales amount of a business operator who participated in the concentration in the territory of China exceeded RMB800mn, such operator shall make a prior filing with the anti-monopoly enforcement authority. Some members of the Standing Committee deemed that such filing criteria was too low, some held that it was improper to set the criteria too high, some believed that separate criteria should be made by business, and some even suggested to add the criteria of market shares. Due to the aforesaid different opinions and considering the filing criteria should be constantly adjusted with national economic development, the NPC Law Commission proposed that the filing criteria of concentration should be formulated and adjusted by the State Council.

It should be noted that the Anti-Monopoly Law should only prohibit the combination that severely impairs market competition, and consequently, the filing criteria on combination should not be too low, otherwise, it will bring unnecessary cost to those mergers and acquisitions conducive or harm market competition. On the other hand, business combination is important for optimization of the organization structure and improvement of the competitiveness of enterprises as well as an important way to save SMEs in the brink of insolvency. Therefore, if the acquired enterprise does not reach certain scale, the related business merger and acquisition should be exempted from the duty of filing. For example, the US Federal Trade Commission has formulated a filing rule according to the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (“HSR Act”), which specifies not only the minimum amount of merger and acquisition of enterprises for filing but also the minimum business scale of the parties involved in merger and acquisition, hence exempting many filings of combination concerning SMEs. (Harty, 2008) The German law against restraints on competition also specified the exemption of the duty of filing concerning the merger and acquisition of SMEs. In accordance with Article 35 of the German

law, no filing declaration is required for combining an enterprise of market sales amount less than EUR20m with another.

Through above analysis, the author believes that, compared with Article 17 of the Draft Anti-Monopoly Law submitted by the National People's Congress in June 2006, Article 17 of the Draft Anti-Monopoly Law submitted by the Legal Affairs Office of the State Council in November 2005 is better since it took many factors into consideration, including the scale and trade volume of the acquired enterprise. The specific criteria of filing is as follows: (1) Where the transaction volume of concentration exceeds RMB400m, in China the whole assets or the previous year's total sales amount of the business operator who participated in the concentration exceeds RMB1.5b and the total assets or the previous year's total sales amount in the territory of China of any other business operator exceeds RMB500m; (2) where the transaction volume of concentration in the territory of China exceeds RMB1.5b; or (3) if there is no transaction volume of concentration, or if the transaction volume of concentration fails to reach the amount specified in Item (1) or (2), the total assets or the previous year's total sales amount in the market of China of all the business operators who participate in the concentration exceeds RMB5b.[10]

1.3.3 Criteria on substantial review

In accordance with Article 27 of the Anti-Monopoly Law, the anti-monopoly enforcement authority shall consider the following factors when reviewing the concentration: (1) The market shares of the undertakings participating in the

[10] Article 51 of the Provisions on Acquisition of Domestic Enterprises by Foreign Capital jointly promulgated by six ministries and commissions including the Ministry of Commerce and the State Administration of Industry and Commerce in 2006 provides that notification shall be made if merger and acquisition of domestic enterprises by foreign investors meets one of the following situations: (1) The market turnover of one party in that year in the Chinese market exceeds RMB1.5b; (2) enterprises that merger and acquire domestic related industries within one year accumulatively exceed 10; (3) the market share of one party of mergers and acquisitions in the Chinese market has reached 20%; and (4) merger and acquisition gets the market share of one party in the Chinese market to reach 25%. In addition, though failing to satisfy the conditions mentioned above, at the request of domestic enterprises with the relationship of competition, relevant functional departments or guilds, the Ministry of Commerce or the State Administration of Industry and Commerce deems that mergers and acquisitions by foreign investors are involved in huge market share or there exist other major factors that severely impact market competition, it can require foreign investors to make notification. The provision also prescribes the scale criteria for foreign mergers and acquisitions that shall be made notification to the Ministry of Commerce and the State Administration of Industry and Commerce. Upon the implementation of The Anti-Monopoly Law as of August 1, 2008, the anti-monopoly review and the notification criteria in the provision will lose efficiency.

concentration in the relevant market and their ability to control the market; (2) the degree of market concentration in the relevant market; (3) the effect of the proposed concentration on market access and technological progress; (4) the effect of the proposed concentration on consumers and other related undertakings; (5) the effect of the proposed concentration on the development of the national economy; and (6) other factors affecting market competition as determined by the anti-monopoly enforcement authority under the State Council.

In the factors above, the operability of Items (1) and (2) is stronger, which are the major factors to be considered by other anti-monopoly law enforcement agencies. For example, in accordance with Paragraph 3 of Article 19 in German law against restraints on competition, if the combination of enterprises makes it account for at least 1/3 market shares, three or fewer enterprises to jointly account for at least 1/2 market shares, or five or fewer enterprises to jointly account for at least 2/3 market shares and there exists substantial competition among those enterprises, a conclusion can be generally drawn that the combination may produce or strengthen the dominant market position and the prohibition may be quite possible. Since the promulgation of the Merger Guidelines by the US Department of Justice in 1982, Herfindahl-Hirshman Index ("HHI") has been employed to measure the influence of merger on the concentration of the market, the method of which is to add market shares after being squared of all the enterprises in the relevant market and then compare the change of the market concentration degrees before and after the merger. (Wang, 1996) The EC Commission and the Japanese Fair Trade Commission also adopt HHI to measure the influence of merger on market concentration. China's Anti-Monopoly Law should also consider a scientific method for valuing the market concentration degree. The "market control power" in Article 27 of the Anti-Monopoly Law has the same meaning with the "dominant market position", both referring to ability of the business operator to control the price, quantity or other transaction conditions of products in the related market or to prevent or influence other business operators from entering the market. Market share, market control power and market concentration are all closely related to competition policies, which may not only help measure whether concentration can lead to elimination or severe restraint on competition, but also explain the purpose of control over concentration is to prevent the occurrence and enhancement of market power in China.

Article 28 of the Anti-Monopoly Law provides that "If any concentration of undertakings results or may result in eliminating or restricting competition, the anti-monopoly enforcement authority under the State Council shall make a decision to prohibit the concentration", which shows that the basis of China's Anti-Monopoly Law to prohibit concentration is a state competition policy. However, a merger that may result in severe restraints on competition may also

be of positive influence on economy and competition. Consequently, Article 28 also provides that "The anti-monopoly enforcement authority under the State Council may make a decision not to prohibit a concentration, if the undertakings can prove that the positive impact of the concentration significantly outweighs its negative impact, or the concentration serves public welfare", which indicates that China's Anti-Monopoly Law may exempt some concentrations that eliminate or severely restrain competition.

The first reason for anti-monopoly law to exempt concentration is that the positive effects on competition by concentration are more positive, obviously, which is referred to the practice of German law against restraints on competition.[11] (Shang, 2004) However, the positive effects of concentration on competition does not refer to the improvement of the competition advantage of the business operator through concentration but the improvement of the competition structure of the relevant market. For example, if the concentration is not approved, the acquired enterprise may be forced to retreat from the market due to insolvency, in which case, the concentration will be more favorable for market competition than without concentration. Considering international competition, the ant-monopoly enforcement authority may also approve the merger and acquisition of large domestic enterprises. Though such merger and acquisition may result in monopoly in the domestic market, in the circumstance where there is no obstacle to market access or the obstacle to market access is very low, even if the business operator after concentration obtains the dominant market position, it dare not increase the price of products as hope due to the fierce competition of foreign enterprises and foreign products.

The second reason for the anti-monopoly law to exempt concentration is social public interests. In literal meaning, social public interests are not those of individuals or individual enterprises or of individual parties or groups but general and social interests. In anti-monopoly review, the social public interest put forward by business operators are generally positive effects on national economic development, such as the rationalization or specialization of production or

[11] Paragraph 1 of Article 36 of German law against restraint on competition provides that if it is predictable that a merger will produce or strengthen the dominant market position, the Federal Cartel Bureau shall prohibit it, unless the participant enterprises can prove such merger may also improve competitive conditions and such improvement outweighs the adverse conditions of the dominant position. Article 42 provides that in a few cases where the profits caused by the merger for the whole economy can make up for the restraints of competition or such merger conforms to public interests, at application, the Federal Economic Minister may approve the merger and acquisition prohibited by the Federal Cartel Bureau. At approval, consideration should be given to the competitiveness of the enterprises that participate in merger and acquisition in various markets out of the application of this law. Only under the conditions where restraint of competition does not endanger the order of market competition can approval be given. See Editor-in-Chief Shang Ming (2004), 3.

improvement of international competitiveness of enterprises. The provisions of the anti-monopoly law on the social and public interests are very important since economy is complicated, and in view of reality or development, there may exist as conflicts between competition policies and social and public interests or overall economic interests. A comparatively flexible provision may give a lee way to law enforcer, providing it an opportunity for choice between competition policies and industrial policies. On the other hand, social and public interests are relatively a vague concept, as well as a very flexible concept, and the anti-monopoly enforcement authority should cautiously use such concept to exempt the concentration of severely adverse effects on market competition, and otherwise, it may not carefully implement state competition policies as fundamental economic policies of market economy.

It should be noted that the clauses of social and public interests in China's Anti-Monopoly Law refers to the German law, but in German law, the agency that executes the clause of social and public interests is not German Federal Cartel Bureau but Federal Economic Ministery. That is to say, as the enforcement agency of anti-restraint of competition law, Germany Federal Cartel Bureau made decisions only based on competition policies. To improve the transparency of enforcement, Chinese anti-monopoly commission and anti-monopoly enforcement authority should issue regulations or guidelines on concentration, and especially specify the conditions for exemption of the concentration with severely adverse effects on market competition.

Based on the practice of competition policies in developed countries, if a business operator accepts the advice of the anti-monopoly enforcement authority on modification to its plan of concentration with severely adverse effects on market competition, its relevant concentration may be approved. For example, the anti-monopoly enforcement authority may request the business operator to transfer some technology, lower the percentage of shareholding in another enterprise or lower the production capacity in some aspects, and all those measures aim at reducing the adverse effect of concentration on market competition after approval. Accordingly, Article 29 of China's Anti-Monopoly Law provides that "with respect to concentrations not prohibited, the anti-monopoly enforcement authority may decide to attach restrictive conditions that will reduce the adverse effect of the concentration on competition."

1.4 Suppression of administrative restraint on competition

The traditional task of the anti-monopoly law is to prevent market power and prohibit private monopoly, because free competition may lead to monopoly and unlimited freedom of contract may cause unreasonable economic and social consequences, and it is necessary for the state to serve as a referee in competition

to maintain the order of market competition and protect the interests of business operators and consumers. However, on the other hand, the real economic life indicates that the forces constraining competition come from enterprises as well as from the government. Administrative restraints on competition refer to the abuses by governmental departments of administrative power to restrain competition, which are also called "administrative monopoly".

1.4.1 Subjects of administrative monopoly

The reason why administrative monopolies are regarded as abuse of power is that those behaviors are not the economic administration by the government for maintaining social and economic order or the economic policies including industrial policies and financial policies adopted by the government for macro control and regulation. Thus, administrative monopolies consist of three elements: The act of government, the constraints on competition, and the abuse of administrative power.

China's Anti-Monopoly Law specifies the subjects of administrative monopoly are the administrative organs and the organizations authorized by laws and regulations to function in administering public affairs, exclusive of the central government on behalf of the state. In terms of legal theory, as economic law, anti-monopoly law is not applicable to the sovereign acts of the state. The US Supreme Court pointed out in Parker v. Brown in 1943 that "the Congress didn't require the state to follow the Sherman Antitrust Act, and the state may engage in administration or act in its own name by means of anti-competition prohibited for private persons."[12] That means the anti-monopoly law opposes monopoly and protects competition but does not object the policies on constraining competition chosen by sovereign states or the acts constraining competition of the state. The subordinate bodies of central governments and local governmental organs are not sovereign entities, and if their behaviors go against laws or basic policies of the state, the essence of such behaviors is abuse of administrative power, which shall be prosecuted according to anti-monopoly law.

1.4.2 Acts of administrative monopoly

The Anti-Unfair Competition Law of the People's Republic of China promulgated in 1993 has already put forward suppression of administrative constraints of competition. Article 7 thereof prescribes that the government and its subdivisions may not use administrative power in limiting others to purchase the products of the business operators designated or the fair business activities of

[12] Parker v. Brown, 317 U. S. 341, 350–351 (1943).

other business operators or restricting the products of other places from access to local markets or local commodities from flowing into other markets. On contrast, Article 8 in the General Provisions of the Anti-Monopoly Law provides that "administrative agencies or the organizations functional of administration of public affairs as authorized by laws and regulations shall not abuse their administrative powers to eliminate or restrict competition", and furthermore, Articles 32–37 of Chapter 5 of the Anti-Monopoly Law list in details the acts of eliminating and restricting competition by abuse of administrative powers: (1) Coercive transactions; (2) hampering free flow of products; (3) restricting cross-regional biding and tendering activities; (4) rejecting or restricting the investment activities of business operators from other places; (5) forcing business operators to engage in illegal acts of monopoly; and (6) formulating the provisions of eliminating and restricting competition.

Obviously, administrative monopoly is not the practice that administrative organs should have in the market economic system, which is only the consequence caused by Chinese political system reforms lagging behind the economic system reform, severe mixture of administration and business operation and the continuous participation of the government in the production and business activities of enterprises at the current stage. Some people do not understand the law of market economy but continuously adopt the old methods of the planned economic system in the new economic system to interfere with production and operation of enterprises by administrative means; some intentionally abuse the administrative power to realize unjust local interests or departmental interests. However, regardless of the specific performances of administrative monopolies, they have the same means, namely, unjust and unfair use of administrative powers; they are of the same essence, namely, favoring a few enterprises and rejecting other enterprises or favoring a few regions and rejecting other regions; and they have the same consequences, namely, destructing the fair and free competition of the market, hampering the establishment of a large unified national market without survival of the fittest or reasonable and effective allocation of social resources. The abuse of administration powers to restrict competition is often based on collusion between businessmen and officials as well as power-for-money deal, which may trigger social corruption and severely impair governmental image. Therefore, the suppression of administrative monopolies shall be an important task of China's Anti-Monopoly Law at present.

Some hold that administrative monopoly is the unique phenomenon of the current economic life in China, which, however, does not hold water. As a matter of fact, whether in China or in other countries, in the past, at present or in the future, an abuse of administrative powers by the government to restrict competition is an act to the detriment of competition, which has been pointed out

very early by the classical school of economics. Hence, the anti-monopoly law should not only focus on enterprises but also pay attention to the acts of government, otherwise, the anti-monopoly law will be of no much efficiency in maintaining the competitive order of market. For example, Paragraph 1 of Article 130 of German law against restraints on competition provides that "This Law is also applicable to the enterprises all or part of the ownership of which belongs to the state or the enterprises administrated or operated by the state". EC competition law has also comparatively detailed provisions on prohibiting the abuse of administrative powers. For example, Article 86 of the EC Treaty provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules on the competition policies of the EC; and Article 87 of the Treaty provides that Member States shall not utilize any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods incompatible with the common market. In Corbeau of 1993, though the European Court of Justice admitted that La Poste was an enterprise offering universal services, it held that private enterprises could still participate in competition beyond the reach of such monopoly enterprise or where La Poste was of low economic efficiency, hence rejecting the claim of La Poste to prohibit Corbeau from providing express post services. The Court also pointed out that the act of La Poste to restrain Corbeau from providing special post services for the society was unreasonable expansion of its monopoly right, which was in violation of Article 82 related to Paragraph 1 of Article 86 of the Treaty.[13] Such judgment shows that unless in absolutely necessary circumstances, the European Community prohibits all the exclusive rights or privileges that may cause the consequences of restraints on competition. Thus, whether in telecommunication, post or energy services, the exclusive rights or monopoly rights in those aspects should be based on non-profitability and public interests of services, or provision of general services to the society or necessity for use of public networks in reasonable, fair and non-discriminatory conditions.

1.4.3 Legal liabilities of administrative monopoly

As prescribed by Article 51 of the Anti-Monopoly Law, "Where administrative agencies and organizations that have authority for administration of public affairs as authorized by laws and regulations abuse administrative powers and perform

[13] EuGH 19. 5. 1993, Slg. 1993 I 2553, 2569 "Corbeau".

acts which eliminate and restrict competition, their immediate superior authority shall order them to make corrections and impose administrative sanctions on the persons that are directly responsible and other directly responsible persons according to law." Such provision is the same with Article 30 of the Anti-Unfair Competition Law. As known to all, for more than 10 years after promulgation of the Anti-Unfair Competition Law, though everyone knows that administrative monopoly is an act of the most harm to the market competition of China, we seldom hear of any examination and prosecution by a superior authority on abuse of administrative power by its inferior authority to restrict competition. In fact, the "superior authority" here is not a definite one, still less a definite administrative law enforcement organ, and the working staff of such authority may not generally have a very strong sense of anti-monopoly, who may not take the enforcement of the anti-monopoly law as their mission either. On the other hand, the relationship between superior and inferior authorities in the government is often that of friends or acquaintances, in which it is not easy for the superior authorities to keep neutral and fair when handling the disputes between their inferior authorities and third parties. Another issue is that the disputes relating to administrative monopoly generally involve the interests of large-sized state-owned enterprises or local enterprises, which bring forth economic benefits to both inferior and superior authorities, particularly regional protectionism. In such case, it is even harder for the superior authorities to keep neutral and fair, which will generally not take the initiative to get involved in the cases concerned.

Article 51 of the Anti-Monopoly Law shows Chinese legislators have failed to hand the jurisdiction of administrative monopoly over to the anti-monopoly administrative enforcement authorities, which renders the Anti-Monopoly Law a toothless tiger before administrative monopoly. Nevertheless, compared with Article 30 of the Anti-Unfair Competition Law, Article 51 of the Anti-Monopoly Law has added an important provision that "The anti-monopoly enforcement authority may put forward proposals on handling cases according to law to the relevant superior authority." Such provision was added at the 3rd review on the Anti-Monopoly Law by the NPC Standing Committee, which has expressed the hope of the highest legislators to effectively curb the acts of administrative monopoly. In accordance with the law practice of China, it is feasible for the anti-monopoly enforcement authority to give proposals on handling of cases to the superior authority of the organ that is in violation of law. From 1995 through 2005, the State Administration for Industry and Commerce investigated and prosecuted or assisted in investigating and prosecuting 519 cases concerning administrative restraint on competition, including regional blockades and local protection, and played an important role in maintaining the order of market

competition.[14]

2 Challenges in enforcement of anti-monopoly law of China

Anti-monopoly law is a legal system mainly aiming at the acts of enterprises restraining competition, the promulgation of which undoubtedly may be of direct and important influence on the enterprises in Chinese market. It will also be of an important influence on Chinese government departments at all levels and as a law of binding force on the acts of the government, the anti-monopoly law may help improve the anti-monopoly sense of government departments at all levels and their staff and cultivate and develop their competitive culture, which is conducive to advancing Chinese economic system reform and political system reform and promoting the separation of government functions from enterprise management in the long run. The promulgation of the Anti-Monopoly Law will be of an important influence on consumers, and the market competition under the protection of the Anti-Monopoly Law will force enterprises to cut price and surrender part of benefits to consumers constantly and force them to meet the market demand for products in quality, quantity, assortment and varieties, and hence, the Anti-Monopoly Law is a law on protection of consumer rights and interests in practice. Though the Anti-Monopoly Law will exert important influences on Chinese economic life and almost all the economic sectors as a basic law system regulating the economic order and market competition order of the country, it can be predicted that the enforcement of China's Anti-Monopoly Law will confront severe challenges at the initial stage since the task of transformation of Chinese economic system still remains to be completed and the Anti-Monopoly Law remains to be improved in many aspects.

2.1 Controversy over the purpose of anti-monopoly legislation

The biggest challenge in the enforcement of China's Anti-Monopoly Law comes from the understanding by people of the purpose of anti-monopoly legislation. Article 1 of the Anti-Monopoly Law provides: "This Law is enacted for the purposes of preventing and prohibiting monopolistic conducts, protecting fair market competition, improving efficiency of economic operation, safeguarding legitimate rights and interests of consumers and the social and public interests, and promoting the healthy development of the socialist market economy," which

[14] Compiled by the Fair Trading Bureau of the State Administration for Industry and Commerce/CASS Research Center of International Law: Selected Anti-monopoly Cases and Investigation and Analysis on the Chinese Anti-monopoly Administrative Enforcement, Law Press China, 2007, Introduction.

shows that the direct purpose of China's Anti-Monopoly Law is to protect market competition and that the ultimate purpose is to improve the economic efficiency and safeguard the legitimate rights and interests of consumers and the social and public interests. Market competition may undoubtedly improve the efficiency of resource allocation as well as the production efficiency of enterprises, both of which can benefit the society and improve the welfares of consumers. However, the social and public interest is a relatively controversial concept that may have many interpretations. But no matter how to interpret, the social and public interests is a relatively flexible concept as well as a vague one. According to Articles 15 and 28 of China's Anti-Monopoly Law, the party involved may request the anti-monopoly enforcement authority to exempt their monopoly agreements or the concentration that eliminates and restricts competition on the grounds of social and public interests.

In practice, however, which enterprises may be exempt possibly from the Anti-Monopoly Law on the grounds of social and public interests? Obviously, they are large-sized state-owned enterprises. Many clauses in China's Anti-Monopoly Law obviously protect the interests of large-sized state-owned enterprises. For instance, Article 7 provides: "The State protects the lawful operational activities of the undertakings that have a vital bearing on the lifeline of the national economy and national security, in which the State-owned sector holds a controlling right, and that are designated by law to carry out exclusive or monopoly distribution;" Article 5 provides: "Business operators may implement concentration through fair competition and voluntary alliance according to law in order to enlarge scales of operation and improve market competitiveness;" and Article 4 may be regarded as the interpretations of industrial policies, providing that "The State will formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic control and develop a sound uniform, open, competitive and orderly market system." China is currently during economic system transformation and it is necessary indeed for legislators to consider many issues, when it is understandable that law represents many conflicting purposes. In such case, people are bound to question what the first priority is when conflicts exist between competition policy and industrial policy.

In fact, the provision of China's Anti-Monopoly Law on protection of state-owned economy is not wrong in theory, because the legitimate interests of any enterprise should be protected. However, if the Anti-Monopoly Law protects concurrently business operators and consumers, in case of conflicts of interests, law enforcers will face the choice whether to give priority to the interests of consumers or business operators. It was wise for the NPC Standing Committee to cancel the provision on safeguarding the interests of business operators at the second review on the Draft Anti-Monopoly Law. However, the adopted law has preserved the provision on maintenance of social and public interests, and the

social and public interests and the legitimate rights and interests of consumers are parallel. Hence, it is hard to ensure that full consideration will be given to the interests of consumers in enforcement of the Anti-Monopoly Law. For instance, Chinese consumers naturally hope that there exists as effective competition in the civil aviation transport market because they may obtain low-price quality services through competition. However, at present, some propose that China Southern Airlines, China Eastern Airlines and Air China should be merged to organize a "super carrier" to cope with competition in the international aviation market. (Liu, 2008) If Chinese anti-monopoly enforcement authority deems the combination of the three largest airlines conforming to the provision of Article 28 of the Anti-Monopoly Law on social and public interests, both purposes for the protection of consumers and social and public interests will be in conflicts.

Certainly, contradictions and conflicts in different purposes exist in the anti-monopoly laws of other countries and regions. For example, the Discussion Paper on the Application of Article 82 to Exclusionary Abuses issued by the EC Commission on December 2005 pointed out that "The essential objective of Article 82 when analyzing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[15] Here exists as an issue: Whether does EC Competition Law protect competition or take competition as a means of actual protection of the welfare of consumers and improvement of economic efficiency? Actually, the EC Commission has been strictly implementing its competition policies, and the controversy over legislative purposes may generally not affect the implementation of EC Competition Law. However, the controversy over the legislative purposes of China's Anti-Monopoly Law is critical, partly because there exists as strong industrial policy in China's Anti-Monopoly Law where law enforcement agencies may consider both competition policies and industrial policies while hearing cases and laws have not specified whether competition policies are in priority to industrial policies, and partly because the current anti-monopoly enforcement authority of China is not independent. Consequently, when the interests of consumers and those of large-sized state-owned enterprises are in conflicts, time is needed to test whether the anti-monopoly enforcement authority stands in the position of consumers to fight monopoly and protect competition.

It should be noted that in the anti-monopoly field, the social and public interests claimed for by enterprises for exemption are generally short-term. When railway emerged in 1829 as a new transport means in the US, New York

[15] DG Competition's Discussion Paper on the Application of Article 82 to Exclusionary Abuses, p. 4, 54.

Governor Martin van Buren submitted a written statement to the president Jackson to object the competition between railway and canal. He said that if railway was allowed to replace vessels in canals, it would trigger serious unemployment, and thus many people including captains, chefs, pilots, inn keepers and repairmen would be forced to leave canals for living, let alone numerous farmhands employed to plant the forage feed grass for horses. (Massey, 1996) Modern people may generally not agree with Buren. As a mechanism of survival of the fittest, though competition may lead to insolvency of low-efficiency enterprises and consequently reduce jobs, with new competitors entering the market, it may also create new jobs. In general, competition may lower the prices of products and service, raise the actual income of consumers and consequently expand social demand for goods and service, hence, ultimately improving the rate of social employment. Thus, the interests of consumers protected by the anti-monopoly law and economic efficiency and public interests it spares no effort to improve are consistent in essence and there are no conflicts in between.

The provisions of China's Anti-Monopoly Law on social and public interests are based on state circumstances and refer to the practice of the laws of other countries, such as German law. But in Germany, enterprises may seldom be exempted from the law against restraint on competition by excuse of public interests, because the anti-monopoly law is based on maximum social interests. Practice has proven that the overwhelming majority of monopolies including business monopoly and administrative monopoly are unreasonable phenomena, the essence of which is only to restrict the function of price mechanism for adjusting social production and optimizing resource allocation. In a short term, monopoly may lead to the increase of product prices and decrease of quality to detriment of the interests of consumers; and in the long run, monopoly may result in low production efficiency of enterprises and shortage of national economy. More importantly, monopoly will check and curb the competitive spirits of a country which are the real driving force of the economic development of a country. Hence, though the clause of China's Anti-Monopoly Law on social and public interests is necessary for adaptation to the provision of Article 4 of the Anti-Monopoly Law that "the State formulates and implements the competition rules appropriate for the socialist market economy", the anti-monopoly enforcement authority should cautiously use such clause.

2.2 Lack of a uniform, authoritative and independent anti-monopoly enforcement authority

The Anti-Monopoly Law is different from general civil and commercial laws as well as the Anti-Unfair Competition Law, and its tasks are to fight against the

acts of restraint on competition of large enterprise groups or monopoly enterprises but supervise governmental departments and prevent from abuse of administrative powers to restrict competition. This requires the anti-monopoly enforcement authority to be authoritative and independent and with a due position, otherwise its enforcement may be interfered and affected by other governmental departments. Nevertheless, according to Article 10 of the Anti-Monopoly Law and the interpretations of the relevant departments under the State Council, in the initial period of the enforcement of the Anti-Monopoly Law, a pattern has taken shape where three institutions including the Ministry of Commerce, the State Administration for Industry and Commerce and the National Development and Reform Commission are jointly in charge of enforcement.

The multi-enforcement of anti-monopoly law is an arrangement that people are not willing to see. Compared with the establishment of a single enforcement agency, multiple enforcement institutions may incur high cost and low efficiency, and controversy and frictions are unavoidable. Another fatal weakness of the three-party administrative law enforcement is that they are all affiliated to ministries and commissions under the State Council with low ranks and less authoritativeness, and since their competent departments, especially the National Development and Reform Commission, are important agencies authorized to formulate and implement national macro-economic policies, it is hard for the subordinate anti-monopoly law enforcement agencies to remain independent. Thus, the author believes the best way is for the State Council to integrate such three anti-monopoly law enforcement authorities into a unified agency and endow it with necessary authority, or an agency at the ministerial level directly under the State Council.

Article 9 of the Anti-Monopoly Law provides that the State Council will set up an Anti-Monopoly Commission responsible for organizing, coordinating and guiding anti-monopoly activities. In view of the division of the authority of anti-monopoly law enforcement, it is much necessary to set up the Anti-Monopoly Commission. However, the author worries that the Anti-Monopoly Commission may not play a right role in promoting competition policies. In accordance with the Draft Anti-Monopoly Law submitted by the State Council to the National People's Congress, the Anti-Monopoly Commission shall be composed of responsible persons from the relevant departments and agencies under the State Council and some experts. Considering the majority of agencies under the State Council are mainly to implement national industrial policies, people will see whether the Anti-Monopoly Commission consisting of the responsible persons can make efforts to promote competition policies.

2.3 Issues of administrative monopoly

There has been controversy over whether to fight administrative monopoly in Chinese anti-monopoly legislation, Article 8 of the Anti-Monopoly Law explicitly provides that administrative agencies or the organizations functional of public affairs authorized by laws and regulations shall not abuse their administrative powers to eliminate or restrict competition. In addition, Article 5 of the Anti-Monopoly Law also specifically provides for prohibition of the elimination and restraint on competition by administrative power. The Anti-Monopoly Law on administrative monopoly is of great significance, which not only indicates the firm attitude of Chinese legislators against administrative monopoly, conducive to improving the anti-monopoly sense of government agencies at all levels, but also demonstrates the nationwide mainstream viewpoints against administrative monopoly, which is conducive to advocating and cultivating a competitive culture in China.

However, the Anti-Monopoly Law does not hand the jurisdiction of administrative monopoly over to the anti-monopoly law enforcement authorities. According to Article 51 thereof, where administrative agencies and organizations abuse administrative powers which eliminate and restrict competition, their superior authority shall order them to make corrections. Hence, it is criticized that China's Anti-Monopoly Law is more in form but less in substance in suppressing administrative monopoly. The author holds that China should learn from the practices in anti-monopoly laws of other countries or regions and hand the task of supervision and check of administrative restraint on competition over to the ant-monopoly law enforcement authorities. China should also reform its administrative law and enable Chinese courts to supervise the governmental acts including the abstract acts. Of course, whether Chinese anti-monopoly administrative law enforcement authorities may undertake the task of suppressing administrative monopoly depends on whether they are a unified, independent and authoritative agency. At present, the most majority of anti-monopoly law enforcement agencies are authorized to supervise the governmental acts of restricting competition by abuse of power, such as the EC Commission, German Federal Cartel Bureau and Japan Fair Trading Commission. It is undeniable that the fight against administrative monopoly is a hard task in any country since it is to restrict governmental power, especially in China, for it requires China to deepen both economic system reform and political system reform. Nonetheless, the popular existence of administrative monopoly is a severe challenge in the enforcement of anti-monopoly law, and in the social environment where enterprises popularly seek for government protection or pursue "rent-seeking" through government, it is impossible to implement the anti-monopoly law effectively.

2.4 Relationship between the ant-monopoly law enforcement and the industry regulation

The Anti-Monopoly Law prohibits the abuse of dominant market positions, and it is naturally supposed to pay close attention to those large enterprises of monopoly positions or dominant market positions, especially the state-owned monopoly enterprises in such fields as telecommunication, postal, railway, electricity and banking. Nevertheless, such large-sized state-owned enterprises have their own supervision agencies, and thus, it is a sensitive topic whether the anti-monopoly law enforcement authorities may acquire the jurisdiction of such supervised enterprises. China's Anti-Monopoly Law has not explicitly specified the relationship between the anti-monopoly law enforcement authorities and supervision agencies, which, however, does not indicate that this problem has been solved, and China's top legislator believes that the relationship should be fully considered by the State Council. As such supervision agencies are mostly those at the ministerial level in China and many China's administrative agencies are unwilling to release any administrative power, it is not optimistic whether the anti-monopoly law enforcement authorities may acquire the jurisdiction over supervised industries.

When handling the controversies between supervised enterprises and other enterprises or consumers, virtually, the practices of market economy have showed that the supervision agencies often stand in the position of supervised enterprises, which is called the "supervised capture" theory by economists. Supervised enterprises in China are mostly state-owned monopoly enterprises and it is more common that the supervision agency utilizes administrative power to maintain profits of the vested monopolists. On the other hand, the power distribution of supervision agencies is not aimed at objection of monopoly and protection of competition, and such agencies generally have no sense of anti-monopoly and may not adapt to the requirements for anti-monopoly. Another issue is that China has established the competent departments or supervision agencies important for national economy and people's livelihood including telecommunication, electricity, postal, railway and petroleum. If such agencies apply their own departmental laws and regulations respectively to deal with the cases concerning restraint on competition, different policies may come from different departments, hence lowering the efficiency of ant-monopoly law enforcement, and ultimately, it is hard for China to establish a nationwide uniform market competition order. In this regard, China should learn from the practices of other countries, and starting from actual circumstances, hand the jurisdiction of restricting competition in supervised industries over to the anti-monopoly law enforcement authorities. Anyway, it is wrong to eliminate the jurisdiction of the anti-monopoly enforcement authority in supervised industries,

which will not only severely impair the authoritativeness and position of the anti-monopoly enforcement authority but also unfavorable for the promotion of state competition policies.

2.5 Promulgation of the Anti-Monopoly Law is the first step of anti-monopoly legislation

China's Anti-Monopoly Law consists of 57 articles only, with provisions mostly in principle. To have this law more operable, the Anti-Monopoly Commission and the anti-monopoly law enforcement authorities to be established by the State Council in the near future shall issue detailed rules or guidelines in various aspects such as relevant market, horizontal agreements of restraint on competition, vertical agreements of restraint on competition, concentration of business operators, abuse of the dominant market position and abuse of intellectual property rights. For example, Article 55 of the Anti-Monopoly Law provides that it is applicable to the undertakings which abuse intellectual property rights and eliminate or restrict market competition. However, what acts are abuses of intellectual property rights to eliminate and restrict competition? Legal interpretations are required. Consequently, the promulgation of the Anti-Monopoly Law is merely the first step in its anti-monopoly legislation, and China has a very long way to go.

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