

ISSUES SURROUNDING THE DRAFTING OF CHINA'S ANTI-MONOPOLY LAW[†]

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The 1997 United States v. Microsoft¹ Anti-Monopoly lawsuit has caught the attention of not only the world in general, but also the Chinese government and the Chinese people. Considering the existing variety of monopolistic practices in Chinese businesses, many scholars are expressing their views on the necessity of anti-monopoly legislation in China.²

I. ISSUES IN THE DRAFT LAW THAT REQUIRE FURTHER CONSIDERATION

The Law Against Unfair Competition was passed in China in 1993.³ In May of 1994, an Anti-Monopoly Law drafting group, which consisted of members of the legal departments of the State Economic and Trade Commission (SETC) and the State Administration of Industry and Commerce (SAIC), was organized and established to discuss the possibility of an Anti-Monopoly Law. During the legislative process, the drafting group listened to opinions and suggestions from Chinese experts on Anti-Monopoly Law. At the same time, international organizations and foreign countries with advanced market economy systems such as OECD, World Bank, UNCTAD, APEC, Germany, the United States, Japan, Australia, and South Korea continuously supported the drafting group. OECD in particular contributed greatly to the international symposiums organized jointly with the Chinese drafting group on Anti-Monopoly Law between 1997 and 1999, in which the draft law was discussed article by article.

There are fifty-six clauses in the eight chapters of the latest draft of the Anti-Monopoly Law as of February 26, 2002.⁴ Generally speaking, it is a

[†] Due to circumstances beyond the Law Review's control, we have relied on the integrity of this Author for facts asserted herein that are not supported by a citation. All cited Chinese language sources were verified by Global Studies.

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1. United States v. Microsoft Corp., 147 F. 3d 935 (D.C. Cir. 1998).

2. See Wang Xiaoye, *The Stipulation of Chinese Anti-Monopoly Law is Urgent*, LEGAL DAILY (FAZHI RIBAO), Apr. 23, 2000.

3. Adopted at Third Meeting of the Standing Committee of the Eighth National People's Congress on September 2, 1993, promulgated by order No. 10 of the President of the People's republic of China, and effective as of December 1, 1993. See Zhonghua renmin gongheguo fanbuzhengdang jingzheng fa [The PRC on Unfair Competition] in Quanguo renmin daibiao dahui changwu weiyuanhui gongbao [Gazette of the Standing Committee of National People's Congress] No. 5, 35 (1993).

4. Unpublished draft.

draft with real substance. From a substantive perspective, legislative experiences from advanced countries, particularly Germany and other EU countries, influenced the provisions on the prohibition of restrictive competition agreements, abuse of dominant market positions, and restrictions on mergers and administrative monopolies. The most notable characteristic of the Draft Chinese Anti-monopoly Law is the provision prohibiting administrative monopolies.⁵ This provision exists because, unlike other countries, the most serious impediment to competition in China comes from the government itself.

In addition to the substantive provisions, there are also procedural provisions, such as those concerning enforcement authority and legal liabilities, including administrative, civil, and criminal liability. The international legislative fashion is also incorporated, for instance, in the extraterritorial application of the law according to the effects doctrine under Article 2. This article provides: "This law shall apply to the activities conducted outside of Chinese legitimate territory but with the consequences of restrictive competition on domestic markets."⁶ In Chapter 8 of the latest draft law, the initial provisions on the exemption for utility enterprises in the areas of postal services, railroad, electricity, gas, and tap water are removed. The Draft is only effective, however, from a general perspective. From a more specific point of view, the Draft has clear shortcomings.

A. *Monopolistic Agreements*

The restrictions on monopolistic agreements in the Anti-Monopoly Laws of many countries include restrictions on not only horizontal agreements (cartels) but restrictions on vertical agreements as well. For example, the German Law Against Restrictive Competition deals with cartels and other horizontal agreements in Chapter 1, while dealing with vertical agreements in Chapter 2.⁷ The reasons for distinguishing between horizontal and vertical agreements are self-evident; the majority of vertical agreements are legal because they are regarded as positive factors in promoting economic development. For instance, under Article 16 of the German Law Against Restrictive Competition, the following exclusive or restrictive practices of an enterprise are regarded as illegal only when the enterprise has a dominant market position:

5. Unpublished draft.

6. Unpublished draft.

7. See Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] v.27.7.1957 (BGB1.1 1081) (W. Ger.).

(1) restricting the buyer's freedom of use of a transferred commodity from the seller or other commodities or services; or (2) restricting the other side of a transaction from purchasing from a third party or supplying to a third party; or (3) restricting the other side of a transaction from reselling the commodity given to a third party; or (4) requiring the other side of a transaction to purchase goods or services which are neither materially relevant to the subject matter of a contract nor normal to the conventional business practices.⁸

Therefore, if the entity concerned has no dominant market position, the vertical restraints are not illegal. Nevertheless, Article 14 of the German Law says that when a party to a contract imposes a price restraint on the other party or otherwise restricts the other side to conclude a new contract with a third party, such restriction shall be illegal.⁹ Similarly, Article 18 of the 1991 Taiwan Fair Trade Act¹⁰ and the E.U. Green Book on Competition Policies of Vertical Restrictive Competition¹¹ treat vertical price restraints as illegal activities.

However, there is no provision on vertical price restraints in the chapter regarding the prohibition of monopolistic agreements of the Draft Chinese Anti-monopoly Law. Article 24 of Chapter 3 provides that the entity with a dominant market position is not allowed to restrict the resale price when selling goods to wholesale or retail buyers.¹² More specifically, under this draft law, if the enterprise exercising the price restraint lacks a dominant market position, the restraint is legal. This provision is neither consistent with well-recognized international legislative practices nor in the best interest of strengthening market competition in China.

Another issue relating to monopolistic agreements is the legal liability of violators. Article 44 of the Draft Law provides that an anti-monopoly regulatory authority should issue an injunction against those businesses violating the provisions on prohibition of monopolistic agreements and impose a fine of up to five million RMB.¹³ However, Article 45 prohibits the abuse of dominant market powers and allows for a fine of up to ten million RMB.¹⁴ If the conduct constitutes a crime, the violator is subject to criminal charges. From this comparison, it is evident that the drafters consider a cartel

8. *Id.*

9. *Id.*

10. See ZUIXIN LIUFA QUANSHU [THE LAWS OF TAIWAN] 1307 (2002).

11. SEHEN KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN, GRUENBUCH ZUR EG-WETTBEWERBSPOLITIK GEGENUEBER VERTIKALEN WETTBEWERBSBESCHRAENKUGEN (1997).

12. Unpublished draft.

13. Unpublished draft.

14. Unpublished draft.

to be less dangerous than an abuse of dominant market power. However, this conclusion is incorrect because a price cartel may impact users or customers in the same way as monopolistic pricing by an enterprise. In many foreign jurisdictions, similar sanctions are available for these two types of wrongdoing, because of the similar effects they have on market competition. For instance, according to Article 15 of EC Council Regulation 17 of 1962, when a given enterprise violates the provisions of Paragraph 1 of Article 81 or Article 82, it will be subject to a fine of up to one million Euros, in addition to a fine of up to ten percent of its total output in the last business year.¹⁵ In November 2001, the EU Commission fined eight vitamin manufactures in an international cartel a total of .855 million euros. Clearly, the punishment for cartels is severe in many foreign jurisdictions.

B. Abuse of Dominant Market Power

The German and EU provisions relating to dominant market power are incorporated into Chapter 3 of the Chinese Draft Law. In particular, market share is used as the standard to define the dominant position of a given enterprise.¹⁶ It is also used to enumerate the abusive activities in Articles 17 through 24, which make the provisions on dominant market powers more practicable.

For China, from a legislative perspective, it would be better to add a new abusive activity deemed the “unreasonable refusal of interconnection” to the list of abusive activities of market dominant powers. This addition is necessary because that abusive activity is prevalent in Chinese markets. For instance, the Chinese telecommunications infrastructure refuses to open its network except under unreasonable conditions, such as demanding an impossibly high price. Therefore, Chinese lawmakers should learn something from Item 4 of Paragraph 4 of Article 19 of the German Law Against Restrictive Competition.¹⁷ This provision both promotes competition in network or other economic fields relating to infrastructure and protects the ownership of essential facilities. Competition relating to essential facilities exists mainly in the telecommunication, energy, and railroad industries. Although industry-specific regulations should be enacted by the relevant

15. Council Regulation 17/62/EEC, Feb. 6, 1962 Implementing Articles 85 and 86 (Now Articles 81 and 82), 1962 O.J. (13, 21.2).

16. Unpublished draft.

17. According to this provision, market domination exists when the owner of essential facility refuses to grant another access to it. Without access to the essential facility, the other party will be unable to compete in the relevant market. This is an abuse only when there is an objective justification for returning to grant access.

authorities in China,¹⁸ the prohibitive provision in the Draft Anti-Monopoly Law on the refusal to provide access is indispensable, particularly under the existing circumstances where the administrative authorities for these industries have close connections with the telecommunication, electricity, and railroad enterprises. Therefore, the application of an Anti-Monopoly Law to the telecommunication or electricity enterprises that used to be regarded as natural monopolistic enterprises in China would be beneficial in the infant stages of competition in these industries. This kind of measure will eventually increase the competitiveness of these enterprises.

C. Control on Mergers

Regulating mergers is an important means of preventing the creation of monopolies in the first place, and is therefore an important part of drafting the Chinese Anti-Monopoly Law. Article 26 provides that when the turnover of the merging enterprises reach the prescribed limit, an application must be submitted to the anti-monopoly regulatory authority of the State Council.¹⁹ This limit is critical because absent such a limit, the Anti-Monopoly Law would be largely ineffective. However, the Draft Law does not provide for this limit specifically, but rather authorizes a future anti-monopoly regulatory authority²⁰ to define the limit. The delegation of this power may be a substantial obstacle to the effective enforcement of this Law. However, the restrictive provisions on mergers should not be interpreted as an obstacle for large businesses to acquire smaller businesses. Indeed, it is clear that the application requirement for mergers is not applicable to those small businesses whose turnovers are *below* the prescribed limit.

Article 28 provides that the anti-monopoly regulatory authority should make a decision of approval or disapproval within ninety days from the date that it receives the application from the merging enterprises.²¹ However, this ninety-day application period still seems too long for those mergers that can be easily proven not to have potentially harmful effects on market competition. Because the structure of the merging enterprises is unstable during this transitional time, it would be preferable to have a shorter application and examination period.

18. Zhonghua renmin gongheguo dianxin tiaoli [PRC Telecommunications Regulations] (2000), http://www.law-lib.com/law/law_view.asp?id=143 (last visited Dec. 19, 2003).

19. Unpublished draft.

20. Unpublished draft.

21. Unpublished draft.

The German and EU experiences²² in this regard illustrate that the application period should be divided into two stages. The first stage is a one-month period for those mergers that obviously do not have restrictive competition effects, in order to allow them to obtain approval within a short period of time. When no reply is available within the prescribed period of time, approval shall be presumed. Under this provision, a second stage of two months applies only to those complicated mergers with the potential for market dominance.

D. Administrative Monopoly

Chapter 5 of the Draft Law covers administrative monopolies, enumerating a variety of administrative monopolistic activities including compulsory purchase, geographic monopoly, departmental monopoly, compulsory alignment, and other unreasonable administrative regulations that restrict competition.²³ Unlike the previous drafts, the current draft contains a more comprehensive scheme for administrative monopolies. The penalties for departmental or sector monopolistic activities in Article 47 include that, if a governmental department or its affiliated enterprises restrict the free access of other enterprises to a particular market by abusing its administrative powers, the legal consequences should be changed or revoked by the administrative authority at the higher level.²⁴ However, according to other articles in this Chapter,²⁵ for other types of administrative restrictive competition activities, the legal consequences should be resolved by the future anti-monopoly regulatory authority by injunction. That is, there are different legal provisions for sector monopolistic activities and other administrative monopolistic activities. Because a sector monopoly is of the same nature as an administrative monopoly, in that they are both monopolistic activities conducted by governmental bodies or their affiliated departments, it is difficult to understand why there are different legal provisions for each of them. Furthermore, it is not prudent for a higher-level administrative authority to deal with administrative monopolistic activities because the so-called "higher-level authority" is neither a specified nor a defined judicial body. Also the officials of this authority do not have a strong understanding of Anti-Monopoly Law. Alternatively, if the higher-level

22. See *supra* note 7, § 40(1), (2); see also art. 10, Council Regulation 4064/89/EEC, Dec. 21, 1989, On the Control of Concentration Between Undertakings, as amended by Council Regulation 1310/97/EC, June 30, 1997, 1997 O.J. (L 180), 09.07.1997, 1.

23. Unpublished draft.

24. Unpublished draft.

25. Unpublished draft.

authority is authorized to settle the wrongdoings committed by its subordinates, there should be a series of procedures, including a complaint, an investigation, a hearing, and a decision. This would require a substantial investment of both human and financial resources, which is not realistic in China.

To effectively stop the administrative monopolistic activities, strengthen the authority of the anti-monopoly regulatory authority, and incorporate the E.U.'s legislative practices, the administrative monopolistic activities should be subject to the anti-monopoly regulatory authority in the same way as the monopolistic activities of enterprises. Naturally, because there are subordinate administrative relationships, the anti-monopoly regulatory authority should take into account opinions from the higher-level authority of a given administrative body when dealing with administrative monopolistic issues.

E. Anti-Monopoly Regulatory Authority and Its Procedure

The Anti-Monopoly Law, by itself, is not sufficient to maintain fair and free competition. A regulatory authority and procedural mechanisms are indispensable to this goal as well. Compared to the German Anti-Restrictive Competition Law, the Chinese draft is too simplistic in two respects. The Draft Law lacks both legal provisions for an anti-monopoly authority and procedures for settlement and decision-making. In this sense, the Chinese drafters have much to accomplish. China is a vast country, so an anti-monopoly regulatory authority under the state council will be unable to deal with all of the cases throughout the country. Therefore, the law should establish local anti-monopoly regulatory authorities and divide national and local jurisdiction.

Because there is a conflict between industry policies and competition policies, the anti-monopoly regulatory authority, as a watchdog of effective market competition, should be entitled to offer opinions and suggestions on the improvement and enforcement of the Anti-Monopoly Law to the government and its affiliated departments. According to Anti-Monopoly Law experiences in Ukraine,²⁶ the anti-monopoly regulatory authority should also be entitled to offer opinions and suggestions on the draft laws presented to the legislature and any administrative regulations that might impact market competition. To effectively exercise the roles played by market and

26. Sehen Arved Deringer, Die Rolle des Antimonopolkomitees der Ukraine bei der "Transformation" der ukrainischen Wirtschaft, in Ulrich Immenga/Wernhard Moeschel/Dieter Reuter (Hrsg.), Festschrift fuer Ernst-Joachim Mestmaecker, S.553-66 (1996).

competition mechanisms, the government should be obliged to consider the opinions and suggestions of the anti-monopoly regulatory authority when it decides on the establishment, reorganization, merger or dissolution of a group company, or it decides to restrict market access, to award a franchise to a given enterprise, or to make any other rulings which may have a negative impact market competition.

The anti-monopoly regulatory authority should have the power to obtain information about market competition. To assure effective enforcement of the law, the anti-monopoly regulatory authority should be an independent body so that it can exercise its powers without interventions from governmental authorities or individuals. Furthermore, given the activism of WTO members in trade and competition policy, the anti-monopoly regulatory authority should also strive to cooperate with and coordinate its anti-monopoly legislation and policy with international organizations and the relevant authorities of other foreign countries.

II. CURRENT OBSTACLES TO CHINESE ANTI-MONOPOLY LEGISLATION

The drafting committee for Anti-Monopoly Law was organized as early as August 1987. In 1988 a preliminary draft regulation on anti-monopoly and unfair competition law was introduced.²⁷ The Law Against Unfair Competition was approved by the Standing Committee of the National People's Congress at its third session in September 1993.²⁸ However, the Anti-Monopoly Law was not put into effect for several reasons, which are enumerated below.

A. *Different Understandings of the Necessity of Anti-Monopoly Law*

Some scholars argue that the policy underlying Anti-Monopoly Law applies only to well-developed market economies.²⁹ There is no such concern regarding excessive concentration of economic power in China because when compared with well-known large foreign enterprises, Chinese enterprises are relatively small. Therefore, the government should be concerned not with Anti-Monopoly Law, but with encouraging the concentration of small enterprises.³⁰ As early as ten years ago, some scholars

27. Unpublished draft.

28. *See supra* note 3.

29. *See* China Enterprise Evaluation Center, *Zhongguo 1987 nian zuida yibaijia qiye he jiuda hangye* [China's 100 Biggest Enterprises and 9 Biggest Industries in 1987], 2 *GUANLI SHIJI* [MANAGEMENT WORLD] 103 (1989).

30. *See* Li Changqing & Ma Hongmei, *Anti-Monopoly Legislation Should be Delayed*, *LEGAL*

argued that China does not need an Anti-Monopoly Law because the scale of Chinese enterprises is smaller than that of one like America's General Motors.³¹ Many economists and insightful legal experts have shown that this conclusion is incorrect.³² The objective of any Anti-Monopoly Law is to maintain market competition in its own country. Therefore, domestic enterprises must be subject to pressure from market competition in order to guarantee the customers a right to choose products on their own. It is indisputable that Chinese enterprises are not as large as General Motors, but this does not mean that this is not the right time to enact an Anti-Monopoly Law in China. On the contrary, China already has the necessary conditions for the enactment and enforcement of an Anti-Monopoly Law. First, price controls have been eliminated. Second, there is diversified ownership of enterprises. Third, there is increased discretion for state-owned enterprises to manage their own business affairs, almost reaching the level of an independent entity. Fourth, China's economy has become and will become more integrated into the world economy after its entry into the WTO. Therefore, enacting an Anti-Monopoly Law is not premature, but rather essential to the Chinese socialist market economy system.

B. Issues Regarding Administrative Monopoly

Some scholars argue that the most critical issue facing China is the issue of the administrative monopoly, which cannot be resolved by a single piece of anti-monopoly legislation standing alone.³³ Therefore, they argue there is no urgent need to enact an Anti-Monopoly Law in China. Their argument is clearly incorrect. It is undeniable that the administrative monopoly is the most difficult and important issue in Chinese economic reform. The reason for this is that China must not only implement rule of law principles in terms of government administration, but it must also introduce the concept of economic democracy. That is to say, economic power should not be controlled solely by the government, but rather appropriately allocated between the government and private enterprises to remove intervention from private enterprise decision-making. Therefore, an Anti-Monopoly Law

DAILY [FAZHI RIBAO] Mar. 6, 2002.

31. See Wang Xiaoye, *The Prospect of Anti-Monopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 225, 225-26 (2002).

32. See Wang Xiaoye, *Shehui Zhuyi Shichang Jingji Tiaojianxia de Fanlongduanfa* [Anti-Monopoly Law in the Socialist Market Economy], ZHONGGUO SHEHUI KEXUE [SOC. SCI. IN CHINA], Feb. 1996, at 82-84; Ka Lin, *Cong Babaiban de Pochan Shuo Kai Qu* [Reflections on the Bankruptcy of Yaohan], JINGJI RIBAO [ECONOMIC DAILY], Oct. 22, 1997.

33. See Li & Ma, *supra* note 30.

should not be expected to work effectively on its own in order to fight against administrative monopoly. However, the prohibitions on the abuse of power by the government in the Anti-Monopoly Law are beneficial not only for government officials to distinguish between right and wrong, and legal and illegal, but also to improve the awareness of these officials of anti-monopoly policies. From this perspective, the Anti-Monopoly Law is not only an important tool to further economic reform, but also a means to promote political reform in China.

Other countries have used anti-monopoly legislation to resolve administrative monopoly. For instance, Article 86 of the European Community Treaty provides that member states are prohibited from treating their state-owned enterprises and enterprises with franchises or concessions contrary to the competition policies of the EC regime.³⁴ Article 87 prohibits member States from using state financial resources to give preferential treatment to any particular enterprise or industry sector that might have a negative impact on fair competition in the EC common market.³⁵ For historical reasons, there are many legal provisions in the Anti-Monopoly Laws of the states of the former Soviet Union and Eastern European countries that restrict administrative monopolies. For instance, Article 6 of Ukraine's Law Against Monopoly and Unfair Competition of 1992 prohibits any government or its affiliated departments from treating any particular enterprise in a discriminatory way.³⁶ For example, the government may not establish a new enterprise for the purpose of restricting competition, force an enterprise to join a group of enterprises, force an enterprise to provide cheap products to some enterprises, prohibit an enterprise from selling products imported from other regions in order to create a geographic monopoly, or provide tax or other preferential treatment to particular enterprises to give them a more advantageous competitive position. In summary, anti-administrative monopoly law is not only an important feature of the legislation on anti-monopoly, but an important task as well.

C. Hindrance from Government

In addition to the divergent views on the need for an Anti-Monopoly Law and the role of the administrative monopoly, the Chinese government also

34. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) art. 86 (1997).

35. *Id.* art. 87.

36. *See supra* note 26, art. 6.

hinders the enactment of anti-monopoly legislation. As the most important piece of legislation regulating market economic order, the Anti-Monopoly Law will impact other related laws, particularly the Price Law and the Anti-Unfair Competition Law. Also, scholars debate who should be the enforcement authority of the new Anti-Monopoly Law. Should the law be enforced by a newly-established anti-monopoly regulatory authority? Or, should the existing multilateral mechanism be maintained, such that the enforcement responsibility would rest with the relevant authorities regarding administration of industry and commerce, and pricing and technology supervision? Such concerns lead some scholars to conclude that because the approval and enforcement of the Anti-Monopoly Law will have a direct and serious impact on existing enforcement bodies, the enactment of this law should be postponed.³⁷

It is undeniable that with approval and enforcement of an Anti-Monopoly Law, the existing Price Law and the Anti-Unfair Competition Law will have to be revised. As a result, the jurisdictions of the relevant governmental departments will be impacted, and in some instances reduced. However, this does not imply that the change is too severe or unrealistic under the current conditions. The revision and amendment of existing laws and the jurisdictions of the enforcement bodies is not only necessary, but inevitable. If maintaining the existing order is always the first priority, how could these ever be reformed? If there is to be reform, there is no way to shelter the rights and interests of some people from the potential impact.

Some scholars argue that China should not enact an Anti-Monopoly Law, but should instead revise the existing Anti-Unfair Competition Law and the Price Law.³⁸ Under this argument, all restraints on competition can be dealt with by revising these two laws. However, these scholars' ultimate purpose is only to maintain the existing powers and interests of a select group of people.

III. CONCLUSION

The necessity of an Anti-Monopoly Law for a state depends on its economic system. If a state takes the market as the fundamental means of resource allocation, it must combat monopolistic activities by enacting an Anti-Monopoly Law to protect effective competition in the market. Of course, with the approval of an Anti-Monopoly Law, private enterprises will experience pressure from market competition. This pressure is also a

37. See Li & Ma, *supra* note 30.

38. *Id.*

motivation for the enterprises' development. Therefore, with certain exceptions, the competition mechanism should be introduced into all industries. Any form of monopolistic activity, either enterprise monopoly or administrative monopoly, is unreasonable. It functions only to restrict the role of price in setting the level of production and resource allocation in a market economy. In the short term, monopolistic activities increase the price of products, deteriorate product quality, and damage customers. In the long term, monopoly causes production inefficiency and a shortage of economic resources. Most importantly, however, monopoly is detrimental to the competitive spirit of a state and a nation, and this competitive spirit is the real engine behind national economic development.

The Anti-Monopoly Law was listed in the legislative plans of the Standing Committee of the Eighth National People's Congress in 1994 and that of the Ninth National People's Congress in 1998.³⁹ It has now become an important task for new top legislators. Given the significance of market forces and the necessity to promote competition and prevent monopolies, the legislative process for the Anti-Monopoly Law should be accelerated.

39. See Li Peng, Speech at the 27th legal lecture of the 9th Standing Committee of the National People's Congress, (June 29, 2002), in *ZHONGGUO RENDASE* [NATIONAL PEOPLE'S CONGRESS OF CHINA], Issue 14, 2002, at 3.